The Senate

Foreign Affairs, Defence and Trade References Committee

The effectiveness of Australia's military justice system

June 2005

ISBN 0 642 71424 X

Printed by the Senate Printing Unit, Parliament House, Canberra.

Members of the Committee

Senator Steve Hutchins, Chairman; New South Wales, ALP
Senator Sandy Macdonald, Deputy Chairman; New South Wales, NATS
Senator John Hogg; Queensland, ALP
Senator David Johnston; Western Australia, LP
Senator Sue Mackay; Tasmania, ALP (appointed 29.11.2004)
Senator Gavin Marshall; Victoria, ALP (discharged 29.11.2004)
Senator Aden Ridgeway; New South Wales, AD

Substitute Member
Senator Bartlett to replace Senator Ridgeway for the committee's inquiry into the effectiveness of the Australian military justice system

Senator Evans to replace Senator Marshall for the committee's inquiry into the effectiveness of the Australian military justice system

Participating members
Senator the Hon Eric Abetz; Tasmania, LP
Senator Andrew Bartlett; Queensland, AD
Senator the Hon Ron Boswell; Queensland, NATS
Senator George Brandis; Queensland, LP
Senator Bob Brown; Tasmania, AG
Senator George Campbell; New South Wales, ALP
Senator Kim Carr; Victoria, ALP
Senator Grant Chapman; South Australia, LP
Senator the Hon Richard Colbeck; Tasmania, LP
Senator Jacinta Mary Ann Collins; Victoria, ALP
Senator Stephen Conroy; Victoria, ALP
Senator the Hon Helen Coonan; New South Wales, LP
Senator Trish Crossin; Northern Territory, ALP
Senator Kay Denman; Tasmania, ALP
Senator Alan Eggleston; Western Australia, LP
Senator Christopher Evans; Western Australia, ALP
Senator the Hon John Faulkner; New South Wales, ALP
Senator Alan Ferguson; South Australia, LP
Senator Jeannie Ferris; South Australia, LP
Senator Mitch Fifield; Victoria, LP
Senator Michael Forshaw; New South Wales, ALP
Senator Brian Harradine; Tasmania, Ind
Senator Linda Kirk; South Australia, ALP
Senator Sue Knowles; Western Australia, LP
Senator Ross Lightfoot; Western Australia, LP
Senator Joseph William Ludwig; Queensland, ALP
Senator Brett Mason; Queensland, LP
Senator Julian McGauran; Victoria, NPA

Senator Kerry Nettle; New South Wales, AG
Senator Marise Payne; New South Wales, LP
Senator Robert Francis Ray; Victoria, ALP
Senator Santo Santoro; Queensland, LP
Senator Natasha Stott Despoja; South Australia, AD
Senator Tsebin Tchen; Victoria, LP
Senator John Watson; Tasmania, LP

Secretariat
Dr Kathleen Dermody, Secretary (from November 2004)
Ms Peta Leemen, Principal Research Officer
Ms Jessica Shaw, Acting Principal Research Officer
Ms Pam Corrigan, Research Officer
Ms Jenene James, Acting Research Officer
Ms Angela Lancsar, Executive Assistant

Ms Saxon Patience, Acting Secretary (until November 2004)
Dr Pauline Moore, Principal Research Officer (until March 2005)
Ms Anne Flynn, Principal Research Officer (until November 2004)

Suite S1.57
Parliament House
Canberra ACT 2600

T: 61 2 6277 3535
F: 61 2 6277 5818
E: fadt.sen@aph.gov.au
W: www.aph.gov.au/senate/committee/fadt_ctte/index.htm

Terms of reference

(1) The following matters were referred to the Foreign Affairs, Defence and Trade References Committee for inquiry and report by 12 May 2004:

(a) the effectiveness of the Australian military justice system in providing impartial, rigorous and fair outcomes, and mechanisms to improve the transparency and public accountability of military justice procedures; and

(b) the handling by the Australian Defence Force (ADF) of:

(i) inquiries into the reasons for peacetime deaths in the ADF (whether occurring by suicide or accident), including the quality of investigations, the process for their instigation, and implementation of findings,

(ii) allegations that ADF personnel, cadets, trainees, civilian employees or former personnel have been mistreated,

(iii) inquiries into whether administrative action or disciplinary action should be taken against any member of the ADF, and

(iv) allegations of drug abuse by ADF members.

(2) Without limiting the scope of its inquiry, the committee shall consider the process and handling of the following investigations by the ADF into:

(a) the death of Private Jeremy Williams;

(b) the reasons for the fatal fire on the HMAS *Westralia*;

(c) the suspension of Cadet Sergeant Eleanore Tibble;

(d) allegations about misconduct by members of the Special Air Service in East Timor; and

(e) the disappearance at sea of Acting Leading Seaman Gurr in 2002.

(3) The Committee shall also examine the impact of Government initiatives to improve the military justice system, including the Inspector General of the ADF and the proposed office of Director of Military Prosecutions.

Table of contents

Members of the Committee iii
Terms of Reference v
Acronyms and abbreviations xv
Preface xxi
Executive Summary and recommendations xxv

Chapter 1
Introduction and conduct of the inquiry
Referral of the inquiry 1
Terms of reference 1
Conduct of the inquiry 2
Advertisement 2
Submissions 2
Public hearings 3
Confidential material 3
Briefings 4
Provision of expert legal assistance 4
Scope of the inquiry 4
Structure of the report 5
Part 1—Introduction 5
Part 2—The disciplinary system 5
Part 3—The administrative system 5
Part 4—Other important matters that relate to Australia's military justice system 6
Acknowledgments 6

Chapter 2
Australia's military justice system: an overview
The Structure of the Australian Defence Force 7
The discipline system 8
Offences under the Defence Force Discipline Act 10
Service tribunals 11
Courts Martial 11
Defence Force Magistrates 11
Summary Authorities 12
Reviews and appeals 12
Provision of legal assistance 13
Key military justice appointments and agencies 13
The Office of the Inspector-General of the ADF 13
The Defence Legal Service 13
The Director of Military Prosecutions 14
The Registrar of Military Justice 14

The Judge Advocate General 14
Chief Judge Advocate 14
Judge Advocates 15
Service Police 15
Administrative system 15
Administrative inquiries 15
The Routine Inquiry 16
Investigating Officer 16
Boards of Inquiry 16
Combined Boards of Inquiry 17
General Courts of Inquiry 17
Safeguards and rights 17
The role of civilian authorities 18
Adverse administrative action 18
Internal review mechanisms 19
Redress of Grievance 19
Inspector General ADF 19
External review mechanisms 20
Defence Force Ombudsman 20
Other processes of review 20
Relevant Organisations 20
The Defence Community Organisation 20
Complaints Resolution Agency 21
Policy Documents 21
Defence Force Discipline Act 21
Defence Regulations 21
Administrative Inquiries Manual (ADF Publication 06.1.4) 22
Defence Instructions 22

Chapter 3

Disciplinary investigations

Reporting and investigation of alleged offences 25
Shortcomings in the investigation of service offences 27
Previous inquiries 27
The 1998 Commonwealth Ombudsman's 'Own Motion Investigation into How the ADF Responds to Allegations of Serious Incidents and Offences' 27
The 1999 Joint Standing Committee on Foreign Affairs, Defence and Trade Report 'Military Justice Procedures in the Australian Defence Force' 28
The 2001 Joint Standing Committee on Foreign Affairs Defence and Trade report 'Rough Justice? An Investigation into Allegations of Brutality in the Army's Parachute Battalion' 29
The 2001 'Report of an Inquiry into Military Justice in the Australian Defence Force' conducted by Mr J.C.S. Burchett QC 30

Difficulties highlighted in this inquiry 31
Anecdotal evidence 32
The East Timor SAS Investigation 32
Other anecdotal evidence 38
Systemic evidence 39
Individual submissions 39
The Ernst & Young 'Review of Military Police Battalion Investigation Capability' 40
The Director of Military Prosecutions 43
The policy/procedural framework—manuals and procedures 44
Solutions offered in evidence 46
Suggestions from submissions to this inquiry 46
Recommendations from the IGADF-Commissioned report into the SAS Soldier's matter 47
Suggestions from Mr Michael Griffin's Issues Paper 48
Suggestions from the Ernst & Young Report 49
The Canadian Military Police Complaints Commission 50
ADF initiated change 51
Secret Investigations 51
Improving the Serious Crime Investigation capability 51
Response to the Ernst & Young Report 52
Findings and recommendations 52

Chapter 4
Decisions to initiate prosecutions and the provision of legal services
Decisions to prosecute 59
Flawed decisions to prosecute 60
Findings of previous inquiries 61
An independent Australian Director of Military Prosecutions? 62
The framework 63
Assessment of current operation per TOR (3) 65
Case management and workload 65
Personnel—permanent legal and administrative staff 66
Personnel— the Director of Military Prosecutions 67
Findings and Recommendations 69
Defence Counsel Services 70
The Canadian Director of Defence Counsel Services 74

Chapter 5
Disciplinary tribunals
Courts Martial and Defence Force Magistrate Trials 78
Submissions 78
The High Court's decision in "Re Colonel Aird; Ex parte Alpert" 86
Overseas developments 90

Canada 90
United Kingdom 91
United States of America 94
Committee view 96
Tribunals and Appeals – Summary Authorities 96
Findings and recommendations 98

Chapter 6
The administrative system—an overview
Avenues for complaint 107
Self initiated resolution or alternative dispute resolution 107
Making a formal complaint 110
The importance of reporting wrongdoing 111
The effectiveness of the current reporting system 111
3RAR—reporting of wrongdoing 113
School of Infantry, Singleton—reporting of wrongdoing 115
Conclusion 120

Chapter 7
The reporting of wrongdoing in the ADF
Reasons for failing to report wrongdoing or failing to make a complaint 127
Conflicts of interest in using chain of command 127
Culture of silence 128
Downplaying or dismissing complaint 130
Threats of reprisals or fear of 'getting into trouble' 132
Lack of awareness of alternative reporting avenues 136
Frustration with administrative complaint handling processes 137
Seeking a transfer or discharge as an alternative to reporting wrongdoing 138
Committee view 139
Whistleblowing scheme 140
Protection from reprisal 141
Confidentiality 142
Committee view 143
Improvements to the ADF's reporting system 143
Conclusion 145
Using complaints as signposts to broader problems 147

Chapter 8
The administrative system—investigations
The inquiry process 149
Quick assessment 149
Types of administrative inquiries 152
Routine Inquiry 153

Officer Investigation 154
The importance of a well-conducted investigation 155
The effectiveness and fairness of administrative inquiries 155
Procedural fairness—right to know allegations or adverse comment 157
Communication and provision of information—complainants 159
Confidentiality 161
Conflicts of interest and the independence of the inquiry 161
Competence of the investigating officer 168
Assistance to investigating officers 173
Delays 174
Reprisals for providing evidence 177
Conclusion 178

Chapter 9
Administrative inquiries into sudden death
Communication and provision of information—next of kin 181
Conflict of interest—the individual and the institution 184
Competence of inquiries into sudden or accidental deaths and the need for experts 186
The role of the coroner 188
Committee view 189
Procedures following investigation 190
Committee view 191
Inquiries as early detection mechanisms 191
Conclusion 192

Chapter 10
Adverse action, appeal processes and external review of administrative procedures
Appeal and review processes 195
Notice to show cause 196
Redress of Grievance (ROG) 198
The effectiveness and fairness of the notice to show cause and the ROG processes 199
Procedural fairness—access to all relevant material and the consideration of all the evidence 199
Conflicts of interest and the independence of the investigators and decision-makers 201
Assistance when preparing a complaint 204
Competence of investigators 206
Delays 206
Recent initiatives and the role of the Complaints Resolution Agency (CRA) 210

Chapter 11

The IGADF and the Defence Force Ombudsman

Inspector-General of the Australian Defence Force (IGADF) 213
The independence of the IGADF 214
The accessibility of the IGADF 216
Protection of those making submissions to the IGADF 218
Delays in processing a grievance 218
Early days for the IGADF 219
Reporting obligations 220
Measures taken to improve the competence of investigating officers 220
Other external review mechanisms 221
Defence Force Ombudsman (DFO) 221
Independence of the DFO 223
Constraints on the DFO 223
Courts and Commissions 226
Summary 226
Looking forward 227
Proposed new Australian Defence Force Administrative Review Board (ADFARB) 228

Chapter 12

Boards of inquiry

Recent management audit of BOIs 236
Decision to conduct a BOI 237
Committee view 243
The effectiveness and fairness of BOIs 243
Procedural fairness 243
Right to legal representation 244
Preconceived notions about a BOI 247
Communication and the provision of information 248
Conflicts of interest and the independence of the inquiry 250
The competence and conduct of BOIs 254
Access to expert advice 257
Delays 259
Reprisals or interference with witnesses 262
Conclusion 263
Committee view 265

Chapter 13

Disciplinary and adverse administrative action

The disciplinary and administrative components of the military justice system 269
Deciding on disciplinary or administrative action 269
Views on the current relationship between the disciplinary and

administrative components of the military justice system 271
Committee view 273
Double jeopardy 274
Committee view 275

Chapter 14
Australian Defence Force Cadets (ADFC)
The Australian Defence Force Cadets—structure and organisation 279
Cadet Sergeant Eleanore Tibble—a case study 280
Investigation and handling of initial allegation of fraternisation 281
Investigation following the death of CSGT Tibble 282
Procedures for dealing with a minor 283
Acknowledgement of shortcomings and remedies 285
Monitoring of implementation—preventing a recurrence 288
Resources available to the ADFC 289
Future status and administrative arrangements for the ADFC 291

Chapter 15
Occupational health, safety and support services
Features of military service that impact adversely upon mental health 293
The reluctance to report health risks or concerns 294
Failure to treat complaints seriously 295
Investigation processes as a complicating factor in mental health 296
Protracted military justice procedures 298
Duty of care 300
Physical safety 301
Mental health 302
Managing mental health reporting and service provision 306
Reporting mental ill-health 306
Providing mental health services 308
Services to families and support to next of kin 309
Conclusion 311

Appendix 1
Public submissions 313

Appendix 2
Additional information, tabled documents, and answers to questions on notice 315

Appendix 3
Public hearings and witnesses 323

Acronyms and abbreviations

3RAR	3rd Battalion, Royal Australian Regiment
AA	Appointing Authority
AAT	Administrative Appeals Tribunal
ADF	Australian Defence Force
ADFC	Australian Defence Force Cadets
ADFARB	Australian Defence Force Administrative Review Board
ADJR Act	Administrative (Judicial Decisions) Review Act
ADO	Australian Defence Organisation
ADR	Alternative Dispute Resolution
A/LS	Acting Leading Seaman
ANAO	Australian National Audit Office
APC	Armoured Personnel Carrier
APS	Australian Public Service
BOI	Board of Inquiry
CA	Chief of Army; also used for Convening Authority
CAF	Chief of Air Force
CATC	Combined Arms Training Centre
CBOI	Combined Board of Inquiry
CDF	Chief of Defence Force
CFGB	Canadian Forces Grievance Board
CJA	Chief Judge Advocate
CM	Court Martial
CN	Chief of Navy
CNJA	Chief Naval Judge Advocate

CO	Commanding Officer
COMDT	Commandant
COSC	Chiefs of Staff Committee
CRA	Complaint Resolution Agency
Cth	Commonwealth
DADRCM	Directorate of Alternative Dispute Resolution and Conflict Management
DCO	Defence Community Organisation
DDCS	Director of Defence Counsel Services
DFDA	Defence Force Discipline Act
DFDAT	Defence Force Discipline Appeals Tribunal
DFM	Defence Force Magistrate
DFO	Defence Force Ombudsman
DGTDLS	Director General The Defence Legal Service
DI	Defence Instruction
DIA	Defence Investigative Authority
DI(G)	Defence Instruction (General)
DI(G) ADMIN	Defence Instruction (General) Administration
DI(G) PERS	Defence Instruction (General) Personnel
D(I)R	Defence (Inquiry) Regulations
DITI	Defence Investigation Technical Instructions
DJ	Digger James Rehabilitation Unit
DJAG	Deputy Judge Advocate General
DLM	Discipline Law Manual
DLO	Defence Legal Officer
DLS	Defence Legal Service
DMP	Director of Military Prosecutions

DWS	Defence Whistleblowers Scheme
ECHR	European Convention on Human Rights; also used for European Court of Human Rights
FOI	Freedom of Information
GCM	General Court Martial
GCOI	General Court of Inquiry
GNR	Gunner
HMAS	Her Majesty's Australian Ship
HREOC	Human Rights and Equal Opportunity Commission
IET	Initial Employment Training/Trainees
ICCPR	International Convention for Protection of Civil and Political Rights
IGADF	Inspector General Australian Defence Force
IGD	Inspector General Defence
IO	Investigating Officer
JA	Judge Advocate
JAG	Judge Advocate General
JRMJ	Judicial Registrar of Military Justice
JSCFADT	Joint Standing Committee on Foreign Affairs, Defence and Trade
MAJ	Major
MOU	Memorandum of Understanding
MP	Military Police
MPCC	Military Police Complaints Commission
NCO	Non-Commissioned officer
NOK	Next of Kin
NPC	Naval Police Coxswain
NTSC	Notice to Show Cause
OC	Officer Commanding

ODMP	Office of the Director of Military Prosecutions
OHS	Occupational Health and Safety
OIGADF	Office of the Inspector General Australian Defence Force
PAP	Potentially Affected Person
PLO	Permanent Legal Officer
QC	Queens Counsel
RAAF	Royal Australian Air Force
RACMP	Royal Australian Corps of Military Police
RAN	Royal Australian Navy
RAP	Regimental Aide Post
RCM	Restricted Court Martial
R&D	Recuperation and Discharge
RLO	Reserve Legal Officer
RMJ	Registrar Military Justice
ROG	Redress of Grievance
RSM	Regimental Sergeant Major
SA	Summary Authority
SAC	Summary Appeals Court
SAS	Special Air Service
SC	Senior Counsel
SIB	Special Investigations Branch
SME	Subject Matter Expert
SNCO	Senior non-commissioned officer
SSA	Subordinate Summary Authority
SOA	School of Artillery
SOI	School of Infantry

TASAIRTC	Tasmanian Squadron Air Cadet Corps
TDLS	The Defence Legal Service
TOR	Term of Reference

Preface

Report into the effectiveness of Australia's military justice system

On 30 October 2003, the Senate referred the matter of the effectiveness of Australia's military justice system to the Senate Foreign Affairs, Defence and Trade References Committee for inquiry and report. The Committee received 71 public submissions, 63 confidential submissions, and many supplementary submissions. It held eleven public hearings and seven *in–camera* hearings.

The evidence before the Committee ranged across many aspects of the military justice system and covered both disciplinary and administrative processes. This preface contains a summary of the key aspects of the report.

Australia's military justice system

Despite several attempts to reform the military justice system, Australian Defence Force (ADF) personnel continue to operate under a system that, for too many, is seemingly incapable of effectively addressing its own weaknesses. This inquiry has received evidence detailing flawed investigations, prosecutions, tribunal structures and administrative procedures.

A decade of rolling inquiries has not met with the broad-based change required to protect the rights of Service personnel. The committee considers that major change is required to ensure independence and impartiality in the military justice system and believes it is time to consider another approach to military justice.

The Disciplinary System

After extensive consideration and significant evidence, the committee considers that the ADF has proven itself manifestly incapable of adequately performing its investigatory function.

Evidence from those subject to investigation and prosecution under the military justice system, personnel with decades of experience in the military police, and the ADF-commissioned Ernst & Young Report highlight fundamental shortcomings. These include inadequately trained investigators, equipment shortages, outdated manuals, low morale, inability to attract and retain high quality personnel, inordinate delays and inadequate resourcing. Service police members describe an organization in crisis, complaining of poor morale, being overworked and under-resourced, loss of confidence, lack of direction and a sense of confusion about their role and purpose.

The committee considers that all criminal activity should be referred to civilian authorities for investigation and prosecution. Outsourcing criminal investigations in peacetime will allow Service police to concentrate on their key military functions in

support of the forces in the field and focus their resources on training and developing their core business. On overseas operations, criminal activity should be investigated by the Australian Federal Police. The military police should only act where civilian authorities decline to do so. Where this happens, the committee has commented on the need for a radical improvement to Service police training and resourcing

The committee has also examined disciplinary tribunals. Evidence to the committee cast considerable doubt over the impartiality of current structures, and argued that Service personnel's rights to access fair and independent tribunals are under threat. The Special Air Service soldier's case perhaps most comprehensively illustrates the inherent flaws in both investigation and tribunal processes. His experiences, however, were echoed by many submitters to this inquiry. It is apparent that Australia's disciplinary system is not striking the right balance between the needs of a functional Defence Force and Service members' rights, to the detriment of both.

It also considers that a well-resourced, statutorily independent Director of Military Prosecutions is a vital element of an impartial, rigorous and fair military justice system. Until the promised legislation is passed, decisions to initiate prosecutions may not be seen to be impartial, the Director of Military Prosecutions is not independent and, fundamentally, the discipline system cannot be said to provide impartial, rigorous and fair outcomes.

The committee considers that establishing an independent Permanent Military Court, staffed by independently appointed judges possessing extensive civilian and military experience, would extend and protect a Service member's inherent rights and freedoms, leading to impartial, rigorous and fair outcomes.

The committee considers that reform is also needed to impart greater independence and impartiality into summary proceedings. Summary proceedings affect the highest proportion of military personnel. The current system for prosecuting summary offences, however, suffers from a greater lack of independence than courts martial and Defence Force Magistrate processes. The committee therefore recommends an expansion of the right to elect trial by court martial before the permanent military court, and the introduction of the right to appeal summary decisions before the independent permanent military court.

The inadequacies of the disciplinary process have important consequences for the mental health and well-being of service members, their families and friends. Evidence to the committee illustrates that the stresses placed on individuals under investigation in many cases appear to have had longer term effects, including loss of confidence, loss of employment, suicidal thoughts, attempted and actual suicide. These effects are unacceptable.

The Administrative system

The committee also identified serious problems with the administrative component of the military justice system.

Witnesses appearing before this committee who have been the victims of abuse or are relatives of people who have suffered ill-treatment recount their unwillingness to report wrongdoing. In some instances, worried and sometimes frightened parents felt that they had no other option but to contact the ADF directly about their concerns of mistreatment. They did not take this step lightly and, in some instances, even this significant step was still not enough to put a stop to mistreatment or for the ADF to provide the necessary support for the ADF member struggling to cope in the military environment. Some of these ADF members suffered severe psychological breakdowns and in the most extreme cases took their lives.

The very fact that two young soldiers at Singleton were not prepared to pursue their right to make a complaint about cruel and abusive treatment, and that the wrongdoing came to light only through the determined efforts of their parents, speaks volumes about the inadequacies of the administrative system. They were not alone in their experiences. This failure to expose such abuse means the system stumbles at its most elementary stage—the reporting of wrongdoing.

The committee also found the next stage in the administrative system—investigations—seriously flawed. There were alarming lapses in procedural fairness: failure to inform members about allegations made about them, failure to provide all relevant information supporting an allegation, and breaches of confidentiality. Indeed, the committee heard numerous accounts of members suffering unnecessary hardships due to violations of their fundamental rights.

Poorly trained and on occasion incompetent investigating officers further undermined the effectiveness of administrative investigations. The committee found that missing or misplaced documentation, poor record keeping, the withholding of information, lack of support in processing a complaint and investigating officers who lack the necessary skills, experience or training to conduct a competent inquiry, contributed to unnecessary delays and distress. Many of those subject to allegations have endured long periods of uncertainty and anxiety.

Conflict of interest and the lack of independence of the investigator and the decision-maker was one of the most corrosive influences eroding the principles of natural justice and one of the most commonly cited concerns. Many witnesses called for an independent adjudicator so that a neutral and unbiased investigation could take place free from contamination by self-interest or third party influence.

The appeal and review processes underpin accountability and are an essential guarantee against injustice. Yet, evidence clearly showed that the problems evident in administrative inquiries flow into the review processes—lapses in procedural fairness, poorly conducted investigations, conflicts of interest and inordinate delays. In other words, the current review and appeal processes did not remedy the shortcomings in administrative inquiries but rather perpetuated them.

A number of witnesses to this inquiry attributed the onset or aggravation of health problems, particularly psychological, to the difficulties they encountered with the military justice system. Others spoke of a work place where safe and responsible work

practices were not always promoted and which, in some instances, placed the physical or psychological well-being of ADF personnel at risk.

The committee has made a number of recommendations but the key one is designed to establish a statutorily independent grievance and complaint review body.

This initiative is intended to remove from the system the main negative factors that presently undermine its integrity and credibility. It hopes to encourage ADF members to report wrongdoing or to make a complaint. It will enable those who feel unable to pursue a matter through the chain of command to seek redress through an independent and impartial body. Furthermore, this independent review body will take on the important oversight role to ensure that investigators are better trained, that inquiries observe the principles of procedural fairness, and that delays are kept to a minimum. It will be in a better position to take account of the needs and well-being of those caught up in the military justice system.

Overall, the recommendations are designed to put in place a justice system that will provide impartial, rigorous and fair outcomes and one that is transparent and accountable for all ADF personnel.

Executive summary

1. The USA,[1] Canada,[2] the United Kingdom[3] and other European nations[4] as well as Australia,[5] have throughout the past twenty years seen numerous court challenges to the legal validity of their respective military justice systems.

2. Several of these challenges have been successful and resulted in substantial legislative reform, particularly in Canada and the UK.

3. The trilogy of High Court challenges to the military justice system in Australia[6] achieved little success in terms of fundamentally changing the system.

4. However, the issues raised in the court challenges and other concerns voiced in the community in recent times, have resulted in several significant parliamentary, coronial and quasi-judicial inquiries into matters related to the military justice system in Australia, including:

- the 2002-2003 West Australian Coroner's investigation of the HMAS *Westralia* fire;
- the 2001 Burchett QC Inquiry into Military Justice in the Australian Defence Force (ADF);
- the 2001 Joint Standing Committee on Foreign Affairs and Trade (JSCFADT) Rough Justice? An Investigation into Allegations of Brutality in the Army's Parachute Battalion inquiry;
- the 1999 JSCFADT Military Justice Procedures in the ADF inquiry;
- the 1998 Commonwealth Ombudsman's Own Motion Investigation into How the ADF Responds to Allegations of Serious Incidents and Offences; and
- the 1997 Abadee Study into the Judicial System under the Defence Force Discipline Act (DFDA), which Justice Abadee began in 1995.

5. Each of these inquiries has identified, to a greater or lesser degree, shortcomings in the military justice system and its processes. Most of these inquiries made substantial recommendations for change in areas of legislation, policy and

---

1 Weiss v US (1994) 510 US 1.

2 R v Genereux (1992) 88 DLR 110.

3 Grieves v United Kingdom (57067/00) [2003] ECHR 683 (16 December 2003).

4 See the Dutch, Turkish and Romanian cases cited by the European Court of Human Rights in Cooper v United Kingdom (48843/99) [2003] ECHR 681 (16 December 2003).

5 R v Tyler; ex parte Foley (1993-1994) 181 CLR 18.

6 Re Tracey; ex parte Ryan (1989) 166 CLR 518; Re Nolan; ex parte Young (1991); R v Tyler op. cit.

procedure. Many of the recommended changes, such as the establishment of an Inspector General of the ADF (IGADF), have been implemented. Some of the recommendations, such as the convening of a General Court of Inquiry into any ADF death, have not. A few of the recommendations, such as the establishment of a statutorily independent Director of Military Prosecutions (DMP), remain in limbo.[7]

6. In parallel with this current Senate Committee inquiry, the Commonwealth Ombudsman is undertaking an *Own Motion Review of Matters of Administration Relating to Defence's Dealings with People Under the Age of 18 years*, which is yet to be completed.

7. Against this background of almost ten years of rolling inquiries into the military justice system, the Chief of the Defence Force (CDF) recently expressed his view that 'The military justice system is sound, even if it has sometimes not been applied as well as we would like…I have every confidence that on the whole the military justice system is effective and serves the interests of the nation and of the Defence Force and its people'.[8]

8. In view of the extensive evidence received, the committee cannot, with confidence, agree with this assessment. It received a significant volume of submissions describing a litany of systemic flaws in both law and policy and believes that the shortcomings in the current system are placing the servicemen and women of Australia at a great disadvantage. They deserve a system that is fairer, with rules and protections that are consistently applied. The committee has recommended a series of reforms that would constitute a major overhaul of the military justice system in Australia.

9. The submissions made to this inquiry, which number well over 150 and although canvassing a wide range of personal circumstances, contain a number of recurring themes which echo many of the complaints made in previous inquiries. Despite the six inquiries in the last ten years and the subsequent reforms described by CDF and the Service Chiefs,[9] certain types of complaint continue to be made.

10. Complaints were made to this inquiry about recent events including suicides, deaths through accident, major illicit drug use, serious abuses of power in training schools and cadet units, flawed prosecutions and failed, poor investigations. Some of these complaints raise serious concerns about sub-standards of justice meted out within the ADF.

11. The committee believes that all Australians, including ADF personnel, are entitled to the protection of laws and fair process. While the ADF and service conditions make it a unique workplace, it is nonetheless at a fundamental level a modern workplace with a very large workforce that should not be left vulnerable in

---

7 General P. Cosgrove, *Submission P16*, para. 2.83.

8 Proof *Committee Hansard*, 1 March 2004, p. 13.

9 *Submission P16*.

the twenty first century to arbitrary, inadequate complaint resolution and investigative processes.

12. What is striking about the submissions to this inquiry is the variety of background and experience in their demographic. The complainants range from a 15 year old female cadet to a 50 year old male two-star general equivalent and include every single rank level in between those two extremes. They include serving and ex-serving personnel, general service and specialist officers and other ranks, legal officers and health professionals, police and convicted persons, civilian Defence employees and Equity officers, mental health and social workers, community and returned service groups and, most poignant of all, the next of kin of deceased members.

13. The committee's reference was to inquire into 'the effectiveness of the Australian military justice system in providing impartial, rigorous and fair outcomes, and mechanisms to improve the transparency and public accountability of military justice procedures' and the handling by the ADF of a variety of specific matters.

14. Under the terms of reference and in the context of the Committee's role, the committee cannot determine the veracity or otherwise of each and every claim, nor pursue individual remedies for the complainants. However, it is apparent to the committee that in the military justice system there is at least some degree of substance in the submissions the committee has received which suggests the system is not operating properly and justly. This perception in itself is an indictment on any justice system. Modern legal systems are underpinned by the maxim that justice must not only be done but be seen to be done. Assessed against this principle, in too many instances current ADF rules and practice founder.

15. It is clear, however, that substantive injustices to individual servicemen and women have occurred. The ADF has admitted to some of these instances. However, many instances given as evidence to this inquiry met with no comment by the military, despite the committee giving Defence the opportunity to do so throughout the course of this inquiry (by way of written submission). In the view of the committee, the lack of response from the ADF on some of the matters sent to them has made the committee's task more difficult.

16. There are two streams in the military justice system, disciplinary action and administrative action.[10] This report discusses the principal issues raised by the submissions in respect of each of these streams, with particular reference to the recurring themes.

Disciplinary action

17. The discipline related issues and recurring themes raised in this inquiry include:

10 *Submission P16,* para. 2.13.

- inordinate delay in investigation of alleged offences—in some cases investigations have gone on for several years;
- poor quality investigation of alleged offences—such as inappropriate questioning of civilian family members, failure to check easily obtainable exculpatory evidence, failure to liaise closely with civilian agencies;
- lack of independence in the investigation of alleged offences;
- failure to obtain and/or act on Australian Federal Police (AFP) and DPP advice;
- lack of independence in the decision to prosecute;
- poor quality prosecution of alleged offences;
- inordinate delay in the decision to prosecute;
- inordinate delay in the trial process;
- lack of independence in the trial process;
- lack of impartiality in the trial process; and
- inordinate delay in the review of trial process.

18. Complaints about disciplinary action and procedures were relatively few in number but they raised matters of very serious concern. CDF said, 'We have got it wrong from time to time in the ADF but this does not make the entire system wrong or ineffective or our people chronically negligent'.[11] Two of the matters in the past year that the committee is aware of that the ADF 'got wrong', it got spectacularly wrong. The degree of error and the ensuing injustice, which were not identified or corrected by 'the system' but by the tenacity and strength of certain individuals involved, calls into question the fundamentals of the system.

19. In one case, an inept investigation and a flawed prosecution of a decorated officer for what amounted to allegations of war crimes, followed by an improper media statement on the trial and then the inappropriate initiation of adverse administrative action, eventually led to a public apology to the officer by the CDF and Chief of Army (CA). The officer told this committee that other, more junior members may not have had the resources to fight these injustices as he had been able to do, and could have been crushed by this system.

20. In another case, a field rank officer was prosecuted some seven years after the date of the alleged offence on charges which the Federal Court later held should not have been preferred because the relevant service offences were time barred. At trial, the Defence Force Magistrate (DFM) referred to this obvious delay, following the plea of guilty and recorded a conviction but without punishment. The submission from this officer's wife vividly describes the damage to his family and him from this protracted process. The costs to the public purse of the lengthy investigation and protracted

11 *Committee Hansard,* op. cit, p. 10.

prosecution and the multiple appeals to the Defence Force Discipline Appeals Tribunal (DFDAT) and Federal Court are extremely large.

21. These submissions and others, described extraordinary delays in the investigation of alleged offences, the failure of investigators to pursue exculpatory evidence, the failure of investigators to disclose relevant material to the accused, the failure of investigators and commanders to advise the accused of allegations at the appropriate time, the failure of investigators and prosecutors (legal officers) to obtain and/or act on specialist advice, the failure of prosecutors (legal officers) to adequately weigh and assess witnesses evidence. The committee is satisfied that these problems did in fact plague some investigations—this point admitted to by Defence in key instances—and the problems are so severe as to constitute systemic failures.

Criminal investigations

22. The nature of claims made to the committee is not new or without substance. Three years ago Burchett QC wrote 'Many of the problems the subject of submissions to the Inquiry had a strong link to a flawed investigation…With regard to Service Police investigations, complaints were commonly about the time taken'.[12] Four years ago, General Cosgrove told the *Rough Justice?* Inquiry that 'It has taken some 2½ years to investigate and bring this matter to disciplinary hearings. This is too long'.[13] In 2003 CA 'commissioned external consultants Ernst and Young to conduct an independent study of the military police capability to evaluate their work and recommend improvements…'[14]

23. The discipline process reaches its culmination in the trial of charges before a Service Tribunal. The Service Police investigative function is critical to the effectiveness of the military justice system. As in the civilian environment, an efficient and effective police force is the cornerstone of a sound justice system. In many ways the present state and status of the Service Police is a metaphor for the entire military justice system. The Burchett report and the CA's reference to Ernst and Young show that the organization is profoundly under trained and under resourced. This committee has received submissions from Service Police members which describe it as an organization in crisis. Members complain of poor morale, of being over-worked and under-resourced, of loss of confidence, lack of direction and a sense of confusion about their role and purpose. The committee believes it is time to consider another approach to military justice and has made recommendations to address this problem.

24. Not long ago, the ADF, and Army in particular, was a totally self supporting entity, capable of being deployed internationally where it could and did support and administer itself. It had its own Survey Corps, its own Education Corps, its own Pay Corps and its own Catering Corps and performed numerous other logistic functions

12 Burchett, op.cit, paras 191–192.

13 JSCFADT, Rough Justice Report para. 3.47.

14 *Committee Hansard*, op.cit., p. 32.

from its own personnel resources. There were many reasons for this not least of which were the tyranny of distance and the complete absence of alternative sources of support.

25. However, the modern ADF and the battlefields and operational theatres are very different. Civilian management principles of ‘core business’ and ‘outsourcing’ have been widely applied across the military. Civilian contractors are everywhere, including Iraq, and have played a significant role in most of the recent ADF operational deployments. The committee believes the role of a criminal law system in the 'core business' is past, and it is appropriate to 'outsource' what is essentially a duplication of an existing civilian system.

26. Broad criminal investigative experience and deep knowledge of the law should be the hallmarks of any investigative service—civilian or military. Civilian police investigators, however, are generally better trained and more experienced in the conduct of criminal investigations than military personnel. Whilst knowledge of the military context is important, the attainment of rigorous and fair outcomes should be the primary aim of a competent system of military justice.

27. Outsourcing criminal investigations in peacetime would allow the Service Police to concentrate on their key military functions in support of the forces in the field. The committee believes that in peace-time the ADF should refer all criminal activity to their civilian counterparts allowing the Service Police to focus their resources on training and developing their core business—the investigation of service offences that have no counter-part in the general population (eg absence without leave, insubordinate conduct). Close liaison could be maintained with their State counterparts and the AFP in particular. Recruitment of Reservists from these organisations should be encouraged.

28. The AFP has been a conspicuous presence in many recent operational theatres. The high level forensic policing skills that the AFP possesses were evident to the world in the aftermath of the Bali bombing and were also used to great effect in the investigation of atrocities in East Timor and in the Solomon Islands. When overseas and on active service, these and other criminal law functions currently performed by servicemen and women could readily be 'outsourced' to the AFP, whose entire business it is to conduct criminal investigations and prosecutions. Contrast this with military personnel who are called on from time to time to investigate criminal offences, but whose main functions, training and reason for joining the military lie elsewhere.

29. Few would argue that the ADF should not maintain its own disciplinary system, and the committee certainly does not. The military discipline system and the prosecuting of service offences that undermine team morale and cohesion, such as desertion, is very important. Military personnel are best equipped to administer such a system. However, this view does not logically extend to the ADF operating an entire criminal system in duplication of the civilian environment. Practical considerations (including financial) and harsh reality (in particular, the relatively poor criminal investigative skills and training of service police compared with mainstream police),

call into question the continued maintenance out of the public purse of a small and under-skilled criminal investigation service. The question has to be asked: Why not keep the money and spend it on other ADF 'core business' requirements, relieve the commanders of having to decide which crimes they deal with and which they cannot and simply refer all suspected criminal activity to the civilian specialists located nearby.

Prosecutions and trials

30. With respect to the quality of legal advice given to the Service Police in their investigations and the assessment of evidence and decisions on prosecution, Burchett QC suggested, 'That the conduct of prosecutions would be undertaken by the office of the DMP using suitably trained and experienced Service Prosecutors…That an arrangement would be made with Federal and/or State DPPs to enable outplacement (I would suggest for significant periods) of Service lawyers for training and to gain experience on an on-going basis'.[15]

31. A DMP has been appointed but remains subject to command as the legislation creating the independent office has not yet been introduced to Parliament. The DMP is a barrister in Melbourne. The DMP office and staff are all in Sydney. The DMP works 'on the basis of being in the office about one week a month as an overseer'.[16] The Chief Judge Advocate (CJA) by way of comparison is a full time permanent officer collocated with the executive in Canberra.

32. The DMP described the office's workload as having 'increased enormously simply because the ADF knows we are in existence'.[17] The proposed DMP role, of making the decision to prosecute charges, will take over that function from some thirty[18] or so one and two star General equivalent officers. However, under the current rules the DMP cannot be above a Colonel rank or equivalent. This means that a person expected to exercise independent judgment operates in the shadow of, and in the service of, the command chiefs who have ultimate power over his or her future (and in particular, future promotion). It is no reflection on the current DMP for the committee to note that there is a significant, inevitable tension between exercise of legal independence by the DMP and the reality of his/her dependence on those of higher rank in the chain of command for future promotion. This tension creates the potential for the DMP's judgement to be clouded or compromised by extraneous factors related to his or her relationship with the chain of command, and unrelated to the case at hand.

33. In the five year period 1998–2002, the ADF held 257 courts martial and DFM trials,[19] a rough average of about one per week. Well over half of these trials (174)

---

15 Burchett, op. cit, p.138.

16 *Committee Hansard,* op. cit, p. 67.

17 ibid., p. 56.

18 Burchett, op. cit., para. 230.

19 *Submission P16*, p. 101.

were Army matters. An analysis of the offences dealt with indicates a mix of military disobedience type offences and misdemeanour crime such as minor assault and simple dishonesty offences.[20] That is, the equivalent of the staple diet of the local civilian magistrate's court in Darwin, Townsville, Brisbane and Sydney, where the major Army units are based.

34. Civilian prosecutors and magistrates are in court almost every day and the courts are always open. Dealing with crime is their core business. The DMP is part time and his office has a number of junior prosecutors who require outside training with the civilian DPPs and mentoring from Reserve practitioners.[21] The Service Tribunals are *ad hoc* and Summary Authorities and JA/DFMs may not deal with criminal matters for months at a time. The committee believes that the public interest and the interests of the ADF would be well served by the efficiencies gained through the ADF relying on the civilian system, which has greater skills and resources and is readily accessible, to prosecute criminal offences.

35. Several submissions from lawyers both military and civilian, invited the committee to reconsider the role of the ADF in prosecuting and trying criminal offences. Aside from the core business question there are real concerns about the legal validity of the whole system. Despite the trilogy of High Court cases which have upheld the constitutional validity of this function, the JAG told this committee of his view that:

> …the current structural arrangements under the DFDA do not fully reflect the considerable body of law that has developed in recent years in connection with the Canadian and United Kingdom military justice systems with regard to the perceived ability of service tribunals to provide a fair and impartial trial. Whether the High Court of Australia would ultimately find the existing structure wanting, to the point of striking all or part of it down, is an issue upon which it is inappropriate for the Committee to express a conclusion. However, I think such a challenge would at least be arguable in light of these developments and it would be better, in my view, to take a proactive approach at this stage.[22]

36. It is likely the JAG's concern would be heightened by the comments of several members of the High Court in the recent matter of Alpert.[23] That matter involved a challenge to the DFDA jurisdiction for a sexual assault offence allegedly committed by a soldier in Thailand while on leave from his unit based in Malaysia. Counsel for the soldier limited his appeal argument to the particular circumstances of service connection but several of the learned Judges made it plain that they were prepared to re-open the entirety of the constitutional validity question. In the light of the recent Canadian and UK developments on fairness and impartiality which were

---

20 ADF Senate Taskforce responses to questions on notice 29 April 2004; also Colonel Hevey 'They will inevitably involve either physical violence or fraud', FADT, p. 65.

21 *Committee Hansard*, 1 March 2004, p. 67.

22 *Committee Hansard*, 21 June 2004, p. 37.

23 Re Aird et al; ex part Alpert B60 of 2003, High Court Transcripts.

not fully addressed in the High Court trilogy of DFDA cases, the JAG's concerns about the potential for the system to be struck down appear well founded.

37. The current DFDA trial system and the ADF proposals for the future involve at least one permanent military officer judge advocate (JA) and possibly more (who could deal with all trials between them) and the panel of Reserve JA/DFMs in support. The trials are convened on an *ad hoc* basis. Despite the largest ADF concentrations being in Townsville and Darwin, there has not been a JA/DFM in Townsville for many years. There is only one Reserve JA/DFM in Darwin. However other JA/DFMs regularly travel from Canberra, Hobart and Melbourne to conduct trials in Darwin and Townsville.

38. The officer charged with war crimes type offences in East Timor gave a powerful description of the deleterious effects of this *ad hoc* trial system. The trial was conducted in Sydney. The prosecutor was located in Brisbane. The JA/DFM was located in Hobart. There were eight pre-trial hearings in the matter, several by telephone, over a period of months. The final proceedings took place on a Saturday. The absence of a central point of focus made things very difficult for the accused and his counsel. Eventually, they had to threaten to seek a Federal Court writ on the grounds of delay and lack of evidence before the prosecution was terminated and thrown out.

39. An independent Registrar of Military Justice is to be established as a means of streamlining this process. However, it appears this office will be predominantly administrative and will not have power to deal with interlocutory matters and make interim orders, so that the problem of pre-trial telephone hearings with officials in various places will remain.

40. It appears that more permanent military officer JA/DFMs may be appointed. The Judge Advocate General, Justice Roberts-Smith, envisages a standing court and/or tenured appointments. Some submissions questioned the validity of limiting these appointments solely to military officers. The British system has traditionally had an independent civilian JAG (currently a High Court judge) and a panel of independent Judge Advocates appointed by the Lord Chancellor, who must be civilian legal practitioners with at least seven years' experience as a solicitor advocate or five years as a barrister.

41. The European Court of Human Rights has consistently described the civilian Judge Advocate as an 'important safeguard' of the UK military justice system.[24] It is apparent from the tenor of those decisions that the Judge Advocate's independent civilian status and civilian trial experience was of major importance to the Court's recent approval of that system in Cooper v United Kingdom.

---

24 Grieve, op. cit; Morris v United Kingdom (38784/97) ECHR 2002-I at para. 71; Cooper v United Kingdom (48843/99) [2003] ECHR 681 at para. 98.

42. In Australia, the JAG is a Reserve officer and a civilian judge and the JA/DFMs have predominantly been Reserve officers with considerable experience of the civilian courts. The exceptions to this have been a number of permanent officers who were made JA/DFM when the DFDA was first introduced but never sat in that capacity and the office of the Judge Advocate Administrator (JAA) now known as the CJA. A series of permanent military officers have filled the JAA/CJA office.

43. In his 1997 report Justice Abadee (a NSW Supreme Court judge and Reserve Brigadier) wrote:

> …that JAs like DFMs must be independent in the exercise of their powers. They must be independent to serve the Defence Force (and indeed the public). Confidence (indeed public confidence) in the system of military justice also requires an appearance of manifest impartiality on their part. The present system of appointment to the judge advocates' panel, as DFMs and as s 154(1)(a) reporting officers (all of which have an involvement of the JAG in the process of appointment), ensures that only those who have achieved sufficient experience and professional standing are so appointed. The requirement that only military officers may be so appointed, satisfies the need that trained military officers with military knowledge and experience are appointed to these roles. In practice, those appointed…have had considerable experience as civil practitioners in the ordinary trial courts. The present system furnishes men and women who have the qualifications and experience, both civilian and military for appointment to these positions.[25]

44. It is apparent that Justice Abadee, like the European Court, placed considerable importance on civilian trial experience and civilian practice for military judges. Indeed, he went on to state:

> I make these observations at this stage because there are those who argue that a greater degree of independence and impartiality might also be achieved by appointing full time judges, in effect, to a military division of the Federal Court of Australia[26] under Ch III of the Constitution with corresponding reduction in the role of the military in its military justice system. There is no compelling or persuasive view in support of such suggestion. Another alternative advanced is the establishment of what might be professional military judges selected from the military to become, in effect, a full time military judiciary.[27] As to this latter view, I do not consider that, as the present situation stands, there are those in the regular services who would be qualified or trained for such position.[28]

---

25 Abadee, op. cit., paras 2.9–2.10.

26 See the JAG's suggestion of a military bench of the Federal Magistrates Court, *Committee Hansard*, 21 June 2004, p. 37.

27 The likely effect of having two or more permanent JA/DFM given the proportion of trials done by the JAA/CJA in recent years.

28 Abadee, op. cit., para. 2.11.

45. In the current system, permanent military legal officers of the rank of senior Major and above are unlikely to have appeared as counsel in a civilian court for at least ten years and more likely fifteen years. Consequently, the civilian trial experience so highly valued by Justice Abadee and the European Court, is not and will not be present for some time, in the pool of permanent military legal officers available for judicial appointments.

46. On the other hand, there remains a large pool of Reserve officers with the necessary experience of the civilian courts to fill these positions. It is noteworthy that prior to the introduction of the DFDA in the mid-eighties, there were no Defence Force Magistrates, only courts martial with Reserve Judge Advocates. The JA then, as now, made rulings and advised on the law. The court martial President and the members of the court were the arbiters of fact and also decided on sentence. One of the principal arguments for retaining criminal offences in the military system is that all behaviour of the members of a disciplined force is germane to the control and effectiveness of that force. The argument asserts the need for trained military officers to assess such offences through the prism of their professional understanding of the military and its ethos and cultural needs. That is the classical British common law model which still operates in the UK.

47. The Australian Defence Association (ADA) submission[29] included an extract from a recent House of Lords decision in which their Lordships quote with approval a statement by the Vice Chief of the Defence Staff about this requirement. There have been similar eloquent Australian statements in support of this principle.[30] It is not difficult to see the value and importance of having a court of military officers determining the charges against one of their peers on a military offence such as desertion or mutiny or insubordination or disobedience.

48. However, in Australia post-DFDA, the dominance of the court martial in determining such matters has been substantially reduced and the function has shifted largely to the DFM who sits alone. Justice Abadee noted the 'movement towards the use of DFM proceedings'[31] and recorded that for the 4-year period 1990–1993, there were 93 courts martial and 161 DFM trials. Five years later, for the 4 years 1998-2001, the trend had become even more marked, with 34 courts martial and 174 DFMs. Indeed by 2002 the DFM trial was by far the preferred forum with 46 DFMs and only 3 courts martial. Since its introduction, the DFDA has significantly altered the approach to the administration of military justice with the once dominant court martial and its centuries of military tradition giving way overwhelmingly to the single DFM, sitting alone**.**

49. As previously recognized, one may readily accede to the arguments in favour of a court of military officers trying a military discipline offence where there is no civilian counterpart offence. The committee certainly supports this argument. It

---

29 *Submission P39.*

30 Re Tracey, op. cit. at 545; General Cosgrove, op. cit., para. 2.1–2.9.

31 Abadee, op. cit., para. 2.37.

would, however, have difficulty accepting the importance of having that court of officers decide a strictly criminal offence such as stealing Commonwealth property. For example, it could see no need for, say a RAAF Reserve Magistrate to travel from Melbourne to Townsville to try a charge against an Army soldier for stealing property. This is particularly the case if the trial has been delayed pending the availability of that RAAF officer.

50. In less than 20 years the Australian military justice system has moved from the application of discipline through the traditional method of trial by court martial to a system which has transferred the centre of gravity to legal officers, sometimes of a different service entirely and with little obvious connection to the service of the accused or the forum. The ADF is certainly more tri-Service in much of its approach today and officers in particular have greater exposure to the other services.

51. Returning to the question of removing criminal offences from the military justice system, the committee considered the argument that the ADF needs the capacity to deal with such offences on operations. One reasonable way to assess the strength of this argument is to examine how often such offences are actually dealt with on operations. Since the DFDA was introduced the ADF has seen outstanding service on peacekeeping and warlike operations in many parts of the world. Some of these deployments have involved very large forces for extended periods of time, for example, Somalia, Cambodia and East Timor.

52. It appears that almost no criminal offences have been tried in any theatre of operations during this time. The single exception was an assault in Namibia in 1989. The permanent Defence base in Butterworth Malaysia which has had some trials of minor criminal offences is not an operational theatre (spouses and children accompany members). A few courts and DFM trials have been conducted on operations but all except one held sixteen years ago, have been for service offences such as desertion, dangerous behaviour or disobedience. Conversely some serious criminal matters have been committed in theatre but were only tried on return to Australia. The trials conducted in theatre have involved both permanent and Reserve JA/DFMs.

53. It is argued by some that it is too difficult to draw a line dividing the strictly criminal offences from the purely military offences. However, the DFDA already restricts the disposition of certain offences in Australia, for example, possession of certain types and volumes of illicit drugs cannot be dealt with under the DFDA and serious crimes such as manslaughter and murder must be referred to the civil authorities. Moreover, the service connection test was recognized by its authors, Brennan and Toohey JJ in *Re Tracey*, to present some difficulty in application. Nevertheless service authorities have been applying this distinction successfully for some 15 years.

54. The final matter raised in submissions is the position of those military officers who act as counsel representing the accused in a military trial. Following the Federal Court decision of *Stuart v Sanderson*, members are entitled to the counsel of their choice (at Commonwealth expense if the counsel is a military officer) if that officer is reasonably available. It has been submitted that those officers should form part of an

organization similar to the US military Trial Defense Service headed by a senior officer with independent status similar to the DMP, so that they may be free of and be seen to be free of command influence.

Reform

55. The discipline system is clearly not effective in some areas and needs reform. Defence has taken steps to improve processes but arguably these initiatives treat the symptoms and not the cause. The committee believes that the military justice system in its current form clearly needs a comprehensive, ground up reform. In its historical development, it has been amended, adjusted and added to repeatedly from what began as a self contained system within Defence.

56. This is no longer the situation, and civilian courts and civilian police are now readily available. Furthermore, the evidence is that this costly duplicate criminal law system is set to become even more costly, with an independent DMP with a permanent staff of eight, an independent RMJ and his staff and an independent permanent CJA (with more to come). Yet the evidence is that this system has not dealt with a significant criminal offence on operations in 20 years. There is a clear question as to whether this is a continuing requirement for the public purse to bear the cost of maintaining a separate but parallel criminal law process, particularly one which involves extensive delays and the risk of inadequate investigations and prosecutions. Moreover the JAG has identified a serious potential for the whole system to be struck down for lack of fairness and impartiality.

57. It is twenty years since the last major overhaul of the military justice system which saw the introduction of the DFDA. It is now time to look again at comprehensive reform. The committee received submissions from many serving members and officers of the ADF, concerned parents and mental health professionals questioning the reliance on discipline as a substitute for leadership on some problems in the ADF.

58. The DFDA creates three categories of offence:

(a) Military discipline offences for which there are no civilian counterparts (e.g. absence without leave, insubordinate conduct, disobedience of command, etc.)

(b) Offences with a close civilian criminal law counterpart (such as assault on a superior or subordinate); and

(c) Civilian criminal offences imported from the law applicable in the Jervis Bay territory.

59. The committee recommends that criminal offences (that is, categories (b) and (c) described above) be removed from the military justice system altogether. That is, all criminal offences allegedly committed by members of the ADF that are crimes in the general community too, including those specified separately in the DFDA that have a close civilian counterpart, should be investigated and prosecuted by civilian police and not by the military. Thus, the committee believes that all suspected

criminal conduct in Australia by servicemen and women should be referred to the local civilian police. If the local civilian police decide that the military should deal with the matter, they can refer it back to the service police, who will then investigate and prosecute where appropriate using the existing bodies.

60. In considering the likely effects of such changes on the continued maintenance of good order and military discipline, it is useful to look at the reaction of the commanders in the field to the introduction of the DMP. The DFDA places the commanding officer (CO) of a military unit at the centre of the administration of service discipline. The CO is the pivotal point of the system. The DMP has largely taken over this role for dealing with criminal conduct. This has not apparently been resisted by COs, in fact the DMP has been swamped by the flow of matters referred to his office by the COs.[32] Moreover the DMP considers that 'we were flooded with matters which really ought to have been dealt with at a lower level'.[33] This tends to indicate that those most concerned with the maintenance of service discipline are more than happy to refer even minor matters to another authority to deal with and allow them to get on with their 'core business' of training to fight.

Administrative action

61. The other component of the military justice system is the administrative action system, which is concerned with non-DFDA matters, such as boards of inquiry (BOI), administrative investigations, redress of grievance (ROG) and complaint handling, adverse administrative action and review of command decisions.

62. Whereas the discipline system is largely informed and controlled by the rules and principles of the criminal law, the administrative system is 'subject to administrative law principles, especially the fundamental principles comprising natural justice (also called procedural fairness).[34]

63. The majority of complaints made to this committee were about the administrative component of the military justice system. Again there were common themes which echoed from the previous inquiries over the past ten years. The issues raised in the submissions largely mirror the disciplinary complaints and include:

- untrained investigators;
- inordinate delay in investigation of complaints—in some cases investigations have gone on for several years and through various levels of review;
- poor quality investigation of complaints—failure to identify and speak to relevant witnesses, failure to consult with civilian family members on terms of reference, failure to check easily obtainable evidence, failure to

32 *Committee Hansard*, 2 August 2004 , p. 53.

33 ibid.

34 *Submission P16*, para. 2.58.

liaise closely with civilian agencies, failure to disclose relevant evidence;

- failure to observe the principles underpinning procedural fairness such as the right to know about allegations;
- lack of independence in the investigation of complaints—investigators appointed from within the same unit/organisation, investigators of inappropriate rank or command relationship;
- inordinate delay in the review of investigations—in some cases, several years between the investigation and the decision, by which time any favourable remedy is too late;
- lack of independence in the review process;
- lack of impartiality in the review process—'Caesar reviewing Caesar';
- failure by investigators/commanders to follow and apply policy;
- failure to act on, or follow-up on the implementation of, recommendations;
- failure by commanders to keep members informed of developments in complaints/investigations;
- failure by commanders to protect complainants;
- breaches of privacy and confidence, and
- abuse of power in schools/training units.

Investigations

64. Again, as is the case with the disciplinary issues raised, these complaints are not new or without substance. In respect of administrative inquiries, Burchett QC said, 'The quality of the actual investigation, and also the problem of perceived command influence, were major problems…Procedural fairness was an issue, as well as competence'. Mr Burchett referred to similar remarks in the 1999 JSCFADT report and said '…the independence of an officer appointed to conduct an investigation is sometimes a matter of concern'.

65. In response to these and other inquiries and the Ombudsman's 1998 own motion investigation, Defence introduced a variety of initiatives including:

- the Complaint Resolution Agency
- the Defence Equity Organisation
- the Defence Community Organisation
- 1800 telephone complaint systems
- Defence Whistleblower scheme
- Directorate of Alternative Dispute Resolution and Conflict Management
- Inspector General of the ADF

- Directorate of Personnel Operations
- Fair Go Hotline
- Sudden Death Protocols

66. However, despite this proliferation of agencies and mechanisms, the Commonwealth Ombudsman in his 16 February 2004 submission to this committee stated:

> We have received several complaints where it appears Defence has had considerable difficulty in entertaining the notion of investigating a complaint in the first instance despite very clear concerns being expressed both by the individuals involved, as well as by other people in relatively senior positions in the ADF. It is axiomatic that if a complaint is not accepted as a complaint it cannot be resolved.
>
> We have also received some complaints which have revealed deficiencies in the investigative process. Some of the issues which have arisen include:
>
> (a) Investigations of serious allegations being carried out by officers with apparently inadequate training in investigations and approaches inappropriate for the allegations being investigated,
>
> (b) An investigation being thorough but conclusions and recommendations not being drawn together logically from the evidence for the decision-maker,
>
> (c) An investigation taking an inordinate length of time with changes in investigation officer and failure to address the substance of the complaint,
>
> (d) Investigations resulting in recommendations which appear never to have been considered by anyone with the appropriate authority,
>
> (e) An investigation where members of the public are questioned with little apparent thought for the potential consequences, and
>
> (f) Investigations which have taken so long it renders any outcome favourable to the complainant virtually meaningless.
>
> A consistent theme is the need for better training for investigation staff...Regrettably we see a number of complaints from members of the ADF where the time taken for a decision on a redress of grievance seems inordinate.[35]

67. This submission by the Ombudsman is almost completely in accord with the tenor of the various submissions received by the committee about the shortcomings of the ADF administrative system. Moreover it was made well after the implementation of 14 recommendations made in a review by the Australian National Audit Office in 1999 and four years after 24 recommendations made following another review carried out with the assistance of the Ombudsman's staff[36] in 2000. While the recommended

35 Professor John McMillan, *Submission P28*.

36 Ms Harris, *Committee Hansard*, 2 August 2004, p. 21.

changes have apparently had some effect in reducing delays, it appears that major problems remain and even the reductions in delays are relative, as it still takes on average, some 280 days to resolve an 'administration-type grievance'.[37]

68. Furthermore, despite this Inquiry taking place over a year and the establishment of the Directorate of Personnel Operations and the Sudden Death Protocols etc, the committee was saddened to receive, in the week prior to its last hearing, a submission from the parents of another suicide victim who expressed grave concerns about the handling of their son's relatively recent disappearance and subsequent death.

Boards of Inquiry

69. In respect of Boards of Inquiry (BOI), the committee received a number of complaints about the lack of transparency and independence in the appointment and processes of several BOI. Defence refers to a recent audit by a civilian firm Acumen Alliance which reported in December 2003 that 'the board of inquiry process is generally sound and serves the purpose for which it was created'.[38] In written submissions and in oral evidence, Defence continually emphasized that the 'purpose of an administrative inquiry is not to attribute any criminal or discipline liability as is the case under the DFDA'.[39]

70. Nevertheless, BOI have historically been required to make findings as to whether or not any person(s) failed to follow or apply processes or procedures correctly and such findings may be directly related to a cause of death or serious injury, the consequences of which may be of the highest degree of seriousness for the individual concerned. It is a necessary concomitant of such deliberative processes that ADF members' (including deceased members) interests may be put at risk of adverse comment. Whether DFDA or administrative, the potential consequences of such inquiries for individuals can be very serious indeed.

71. The committee notes that a recent audit by Acumen Alliance made a number of recommendations to improve the system. Thirteen stakeholders were interviewed. Only one of those persons was a Reserve Legal Officer (RLO) and none of those persons had been a participant in a BOI as counsel assisting or representing, or as a potentially affected person (PAP), except the Chief Judge Advocate (CJA) who was counsel assisting in two of the eight BOI. Acumen Alliance did not interview any Reserve Legal Officers who had received the sessional fee for appearing in BOI or their clients. Nonetheless, Acumen Alliance concluded that 'The sessional fee determination is inequitable, does not provide value for money, is not commensurate with market rates and the purpose of its application—i.e. for urgent legal work—does not apply in the case of BOI'.[40]

---

37 Defence, Supplementary submission, para. 3.2.

38 CDF, *Committee Hansard*, 1 March 2004, p. 9.

39 Supplementary Defence submission, para. 2.24.

40 The Defence Legal Service BOI Management Audit, October 2003, 1.3.

72. Acumen Alliance states:

> It was suggested that the risk of an inquiry running over time is reduced when permanent officers, rather than reserve members, comprise the Board. The rationale behind this argument was that the imperative to complete the inquiry and return to work is greater for permanent officers…Counsel Representing may become adversarial as they understand their brief to be the protection of the interests of the PAP. There is a strong view and some evidence that Counsel Representing can focus a Board on blame apportionment…lawyers appear to treat BOI as a judicial rather than as an administrative process. This 'judicial approach' does not appear to have arisen, however, where judges or magistrates have been appointed as Presidents.

73. Overall, of the eight BOI examined, Acumen Alliance found only two to have been efficient and effective. Coincidentally these two BOI involved the CJA in the Counsel Assisting role and in one of these, only permanent legal officers appeared as counsel. The latter BOI was described by Acumen Alliance as 'completed on time and well regarded'. It may be that the absence of Reserve legal officers concerning themselves with protecting the interests of the PAP had something to do with this assessment. In any event, the committee is of the view that the absence of any input to the audit report from PAP and the next of kin of deceased members and the counsel representing and assisting in these BOI calls into question the balance of this report. It is also noteworthy that the audit report's approval of judges and magistrates appearing as BOI President is directly opposed by the JAG.[41]

74. The committee noted the desire to improve the inquiry process, but strongly believes that the recommendations put forward by Acumen Alliance do not address the central issue—the perceived lack of independence which can undermine the whole proceedings.

75. This committee received several submissions complaining, inter alia, about the manner in which members and counsel were appointed to BOI, about the conduct of counsel during BOI, about the delays in deciding to conduct a BOI, about the lack of adequate support given to BOI, about the inaccessibility of premises where BOI are held, about the lack of support to next of kin during BOI and about decisions not to hold BOI for certain matters. The committee notes when considering these submissions that the Acumen Alliance audit, which as noted above was not a comprehensive audit, was also critical of six of the eight BOI it examined.[42]

76. The 1999 JSCFADT report recommended that a General Court of Inquiry should be mandatory for all inquiries into the accidental death of an ADF member on an ADF activity. The recommendation was resisted by Defence.

77. The ADF Administrative Inquiries Manual provides (at para. 1.17 et seq)

---

41 *Committee Hansard*, 21 June 2004, p. 38.

42 Acumen Alliance, *The Defence Legal Service: Board of Inquiry Management Audit*, October 2003.

> …the selection of the type of inquiry most appropriate to a specific situation is critical to the efficient management and effective control of an inquiry. Occasionally the choice may be obvious, mandated for example, by the significance of the incident, eg an accident involving loss of life…Where the subject of an inquiry involves the accidental death of ADF members involved in ADF activities, the CDF and the Service Chiefs, as appropriate, will refer the matter to the Minister to determine whether the appointment of a General Court of Inquiry or a Board of Inquiry is appropriate.

78. Annex E to chapter 2 of the Manual indicates that a BOI is appropriate for death and serious injury. It indicates that an investigating officer (IO) may be used in the case of a single death or serious injury 'when the facts are not complex, when the member is not on duty or when it arises from a Motor vehicle accident but there are no suspicious or unusual circumstances'. The annex notes that an IO is not appropriate for 'serious systemic breakdown of Service discipline or morale' but a BOI is.

79. Despite this policy background, it was decided not to hold a BOI into any of the following recent serious incidents:

- major systemic problems involving brutality and harassment in at least two training schools,
- several suicides including the presence of alleged disturbing ethnic undertones and apparent systemic breakdown of morale,
- accidental death on a training base in an Army vehicle, where there were serious questions about the role of seatbelts in all such vehicles and whether they in fact should be used at all,
- two cadet incidents involving female minors,
- major equity problems in a training unit,
- major drug problems in a unit,
- major systemic morale and security problems.

80. These various incidents amounted to over twenty separate matters which Defence elected to inquire into by appointing an investigating officer, rather than by holding a public BOI during which evidence would be given under oath in public and be available for testing under cross-examination. The evidence given to the investigating officers was not on oath, not given in public, nor was it tested by cross-examination. The committee notes with alarm that no training or qualifications at all are required in an investigating officer: a public servant of APS 4 (a junior administrative level) can technically be appointed to conduct a complex investigation into the reasons for the death of a serviceman.

Review of administrative action

81. The committee received a large number of complaints about the internal review processes in Defence. The recurrent themes were, again, lack of independence and impartiality, delay, failure to apply policy and poor quality of decision-making.

82. The review action taken by the IGADF was favourably commented on by the SAS officer who had administrative action taken against him after the failure of the prosecution for the same alleged conduct. It is worth noting that by this stage the matter had been covered in national media and had caused considerable embarrassment to Defence. However other submissions were critical of the IGADF and his office. The heart of the complaints go to the independence of the office of IGADF who is appointed on a contract and is renewable at the discretion of the CDF.

83. As mentioned above, it is a truism of the law that justice must not only be done, it must be seen to be done. Many submissions to the committee were rightly concerned that current review mechanisms such as CRA and IGADF cannot be perceived as independent when they are part of Defence.

84. The number and variety of ADF agencies, policies and processes involved in the handling of complaints is itself problematic. In its supplementary submission, Defence wrote:

> Defence has a number of elements and organizations that manage certain types of complaints. Apart from the Complaint Resolution Agency, these organizations include the Defence Equity Organisation and the Directorate of Alternative Dispute Resolution and Conflict Management. This can create some confusion for complainants and, to an extent, the organizations themselves, about their respective roles. This can result in the duplication of effort and delays. Closer cooperation would provide more effective outcomes.[43]

85. The committee notes and welcomes this acknowledgement by Defence which recognizes many of the problems raised in the submissions, which were observed and tested by the committee in oral hearings and also confirmed by the Ombudsman.

86. The complaint resolution system has been recognized for some ten years to be less than satisfactory. Money and resources have been thrown at the problems but not necessarily in a systematic way, as demonstrated by the plethora of agencies and processes. As with the discipline system, the compatibility of these administrative review functions with the 'core business' of the ADF is questionable.

87. This gives rise to the same question the committee asked about the criminal element of the discipline system. The question is, is the public interest, the public purse, and Australia's military personnel best served by maintaining several layers of a review process conducted by non-specialists in a system lacking transparency and independence and giving rise to a perception of institutional bias? The ADF has implemented a range of initiatives to address problems in the administrative system. All reforms made to date, however, have been broadly reactive and piecemeal. The committee firmly believes this should not continue. Our servicemen and women deserve to be confident that any complaints made by or about them will be investigated according to the highest professional standards. Currently many do not

---

43 Defence, Supplementary submission, para. 3.7.

have this confidence, and could not be expected to, given the state of the relevant laws, procedures and practices.

88. Reform of the administrative investigation system must be root and branch, with the entire function being scrutinized and updated to meet the requirements of operational effectiveness and the public interest. The committee looked to other countries with similar legal systems to see how they had faced the challenge of extending modern rights and protections to their military personnel.

Reform

89. The importance of actual and perceived independence in administrative review was recognized and incorporated into the reforms of the Canadian military justice system in the late 1990s. The Canadian Forces Grievance Board (CFGB) is an administrative tribunal with quasi-judicial powers, and is independent of both the Department of National Defence and the Canadian Forces. It has a statutory mandate to review military grievances and submit recommendations and findings to the Chief of Defence Staff (CDS). The CDS must give written reasons for not accepting the recommendations of the Board, and the Board publishes an Annual Report on its activities.

90. The CFGB began operation in June 2000 and is designated as a department for the purposes of the Canadian *Financial Administration Act*. It consists of a chairperson (currently a senior civilian lawyer), a full-time vice-chairperson and several part-time members all appointed by the Governor in Council for terms of four years. All board members are civilians; two have had military service at some stage of their careers. The Board has a direct support staff including legal counsel.

91. The committee believes that a similar independent review authority in Australia would go a long way towards satisfying the concerns of those who made submissions to this committee. A consistent refrain from Defence in both the discipline and administrative areas, is that decision-makers have to have substantial military knowledge to properly perform their function. The CRA Director, for example, said:

> …you need to understand the environment in which complaints are made to understand where people are coming from when they make a complaint, to understand what access they have to advice and what difficulty they might face in putting in a complaint.[44]

92. The committee notes that the Defence Force Ombudsman and his staff have performed their administrative review function for many years without this military background. The Canadian Grievance Board is now in its fourth year of very successful operation using similar expertise without significant military background. The review of administrative action in a myriad of specialized areas is conducted in many boards and tribunals at the State and Federal level in Australia, by persons with

---

44 Harris, *Committee Hansard*, 2 August 2004, p. 37.

no particular knowledge of the subject under review, but with expert skills in administrative law principles and practice.[45] The committee believes expert skills are equally important in doing ADF personnel justice than direct experience of the military 'environment'.

93. The rationale for an independent body was succinctly expressed before the committee by the Deputy Ombudsman who said:

> In essence, the issue is: why yet another level of review? The first critical feature is that we are independent and impartial. That very significantly changes the character of the review not just because it gives us a capacity to view issues with a freshness and an independence that you just cannot get within the system but also because it presents to the complainant an impartial and dispassionate review so that, even if the outcome is that we uphold the original decision, the fact that we have come to that conclusion can be a significant factor in satisfying the complainant that they have been fairly treated…The second important point is that, while the rate at which we find complaints to be upheld is relatively low, often the complaints that we do find upheld are very significant…Often the issue will be a more significant problem because, were it is a simple problem, the internal grievance processes would have been able to deal with it.[46]

94. What is needed is a statutorily independent body, with appropriately qualified and trained staff and the necessary resources to instill public confidence and efficiently address and resolve administrative matters in the ADF. The Ombudsman performs a review function, and cannot and should not be the primary investigator of grievances by the 70,000 (including Reserves) strong ADF.

ADF Administrative Review Board

95. The committee proposes an organization, called the ADF Administrative Review Board (ADFARB), which would have statutory independence along the lines of the Canadian Forces Grievances Board. The chairperson would be a senior lawyer with appropriate administrative law/policy experience. The organization would have administrative review as its core business. Its resources and skills could largely be obtained at neutral cost by subsuming the current staff positions and assets of the IGADF and the Defence Force Ombudsman, thereby eliminating the internal conflict in priority allocation, which the Commonwealth Ombudsman now faces[47] in addressing Defence matters.

96. The ADFARB would have two major areas of operation. One would be to deal with redresses of grievance (ROG) in a model similar to the Canadian Grievance Board. This could be done in several ways. One way would be to require all ROGs to be sent immediately from the unit to the ADFARB with an information copy to the CRA. Another way would be to specify only certain types of ROG to be referred to

---

45 NSW Administrative Decisions Tribunal, VCAT, Social Security Appeals Tribunal etc.

46 *Committee Hansard*, 9 June 2004, p. 9.

47 Defence Force Ombudsman, *Submission P28.*

ADFARB, with discretion for CDF to refer them later to ADFARB. A third way would be to keep all ROG within Defence until finalized at the unit level and if not resolved there, or if the ROG involves the unit CO, or if it cannot be finalized within a set period, say 60 days from lodgement, it is referred to the ADFARB.

97. CRA statistics indicate that slightly more than half of ROGs are resolved at unit level.[48] Consequently it may be best to provide the opportunity for COs to manage these administrative problems initially and keep the first level of review within the unit for a reasonable period, the suggested 60 days, before it is referred to ADFARB. However, the volume of complaints received by the committee about the handling of ROG at the unit level and the degree of damage caused thereby suggests that some external accountability is required. Therefore, the committee recommends that notification be required to the ADFARB within 5 working days of the lodgement of every ROG at unit level, with 30 day progress reports to be provided to and progress monitored by ADFARB.

98. The program of training for investigators can be maintained within Defence with oversight by ADFARB and the panel of suitable investigators raised by the IGADF can be incorporated into this process (thereby preserving an asset for use on overseas operations as required). ADFARB can call upon such investigators as required or conduct its own investigations or formal hearings if necessary. Dr Nash, the Director of the Ombudsman's Defence Team, told the committee her team rarely needs to travel to investigate complaints. She said:

> Most of the time we get information from Defence and we do it [the review] on the papers etc…On occasion we need to interview somebody formally under an oath or affirmation using the formal powers of the Ombudsman Act but that happens fairly infrequently.[49]

99. The second major area of operation for the ADFARB would be concerned with investigations and inquiries into major incidents. These matters would be the notifiable incidents which all ADF units are currently required to report to higher command, such as death, serious injury, loss of major equipment and matters likely to attract media interest, whether they occur inside or outside of Australia. The chairperson of the ADFARB would be empowered to decide on the manner and means of inquiring into the cause of such incidents. The legal aspects of the relationship with the State and Territory civil authorities could be settled by overriding Commonwealth legislation or by the putative Memorandum of Understanding (MOU) with the States/Territory Coroners.[50]

100. The ADFARB legislation would include matters which the chairperson would take into consideration in determining the manner of inquiry. This might involve consultation with the relevant Ministers, State and Federal, the CDF and Service Chiefs, various civilian authorities and the families and next of kin of ADF members

---

48 Harris, *Committee Hansard*, op. cit., p. 24.

49 *Committee Hansard*, 9 June 2004, p. 18.

50 Defence, Supplementary submission, para. 2.86.

involved. The Minister for Defence would retain absolute authority to appoint a Court of Inquiry should he or she deem such to be necessary. The chairperson would determine the appropriate vehicle for the inquiry and, subject to security considerations, publish written reasons for the choice of inquiry vehicle.

101. If satisfied that an investigation would suffice, the chairperson could select a suitably qualified person from the panel of investigators or from the civilian community. CDF would have the right to nominate a suitably qualified military officer to assist the investigator. The investigator could also come from or be assisted by the ADFARB staff from the ROG area with relevant expertise and experience.

102. If the chairperson decided that a more formal inquiry process was required, akin to the present Boards of Inquiry, then the chairperson could refer the matter to a military division of the Administrative Appeals Tribunal (AAT). The AAT is a Federal merits review tribunal which has a President who is a Federal Court Judge, several Presidential members who are Federal or Family Court judges, Deputy Presidential members both full and part time who are very senior lawyers and a large number of full and part time members who include several retired senior military officers of one and two star rank.

103. The AAT has very considerable administrative law expertise and regularly deals with Defence related matters in Veterans Affairs, Military Compensation Scheme, Comcare and Security issues, in its various divisions. It has offices and conducts public hearings in all major cities and can utilise Commonwealth facilities in other places. Its large number of experienced administrative review members are appointed by the Governor General on fixed terms of appointment. There are sufficient part time members to cope with any surge capacity required for occasional military inquiries.

104. The cost effect of using this existing Federal agency and its state of the art infrastructure would be minimal in contrast to establishing a new agency or continuing with ad hoc BOI. The reputation of the AAT is impeccable and this would be of great importance for perceptions of independence. The members allocated to the military inquiry would be chosen by the AAT President in consultation with the ADFARB chairperson. CDF would have the right to nominate a suitably qualified military officer to sit as a member of the inquiry tribunal. The ADFARB chairperson would appoint the counsel assisting the inquiry from his standing panel of counsel or from the civilian bar. Potentially affected ADF personnel (PAP) would continue to have legal representation at Commonwealth expense, the counsel representing being nominated by the Chief of Defence Trial Counsel.

105. The AAT has the existing skills, resources, experience and independence to provide an efficient and effective external inquiry process for Defence matters at no additional cost and it could be established in this role almost immediately.

106. The results and findings of any AAT inquiry or other investigation undertaken by reference from the ADFARB would be returned in confidence to the chairperson for review. The chairperson if satisfied that the findings are correct would then

determine the further disposition of the matter and if no further action were required, would provide his findings and recommendations to the Minister and CDF. CDF would be required to provide written reasons for declining to accept any recommendations made by ADFARB. The chairperson would publish an annual report of all matters dealt with by ADFARB, including matters referred to CDF and responses to them.

Conclusion

107. The committee is unanimous in its view that the military justice system has reached a watershed in its development. It has been some twenty years since the last wholesale review of the discipline system. During that same period, as described by the Inspector General,[51] the civilian administrative law has undergone enormous change. The military system has attempted to keep up with this pace of change and has done so quite well but it has the appearance of having been largely reactive and piecemeal. There have been numerous initiatives but these lack a coherent and an independent structure.

108. Given the pace of change in the civilian world over the last twenty years, it is perhaps not surprising that the series of rolling inquiries beginning with Justice Abadee, has been happening for the past ten years. Defence is by nature one of the most conservative elements of the community and thus quite understandably somewhat resistant to change. There is a history of social changes which were initially fiercely resisted by Defence but are now accepted, for example, married servicewomen, working service mothers, same sex relationships, women in combat related positions etc.

109. Military command is in many ways defined by obedience and conformity. Discipline is, along with leadership, a crucial underpinning of command. The committee acknowledges that any interference—even parliamentary scrutiny—with the means of administering command through the military justice system is of great concern to the military.

110. It is in the public interest to have an efficient and effective military justice system. Just as importantly, it is in the interest of all servicemen and women to have an effective and fair military justice system. Currently they do not.

111. For ten years now, there have been increasing calls from servicemen and women and their families that all is not well in the military justice system. Repeated inquiries have resulted in piecemeal change but some fundamental principles remain unchallenged. The serious issues raised in the 150 plus submissions made to this committee—including by extremely senior ranks of the military—make it plain that wholesale review and reform of the principles underpinning the current system of military justice is now required. Modern management principles have been visited upon the military and 'core business' has become the guiding principle for most

51 Mr. Earley, *Committee Hansard*, 5 August 2004, p. 86 et seq.

functions. The military legal and administrative system should be subject to the same logic, and, in so doing Australian service personnel will become subject to consistent, professional processes whenever problems arise.

112. Finally, the committee recognises the measures introduced over the last decade by the ADF in response to many of the problems that have again been identified. The fact that these problems continue to be highlighted in this report demonstrates those initiatives are not fully resolving many critical issues.

113. In addition to overhauling the piece-meal approach to reform of the military justice system, the committee believes that close, careful and regular monitoring is required to ensure that those steps taken by the ADF to improve the military justice system are having the desired results. As a result, the committee has resolved to take an active role in examining the effectiveness and fairness of the military justice system on an ongoing basis. To assist the committee in this task, the committee has requested that the ADF submit an annual report to the Parliament outlining (but not limited to):

1. The implementation and effectiveness of reforms to the military justice system, either in light of the recommendations of this report or via other initiatives.

2. The workload and effectiveness of various bodies within the military justice system, such as but not limited to;
   (i) Director of Military Prosecutions
   (ii) Inspector General of the ADF
   (iii) The Service Military Police Branches
   (iv) RMJ/CJA
   (v) Head of Trial Defence Counsel
   (vi) Head of ADR.

114. The following section lists the recommendations contained in the report.

Recommendations

The committee has made a number of major recommendations designed to restructure Australia's military justice system giving particular emphasis to ensuring the objectivity and independence of disciplinary processes and tribunals and administrative investigations and decision making. It has also made a number of additional recommendations intended to improve other aspects of the military justice system concerned mainly with raising the standards of investigations and decision making taken in the chain of command.

The discipline system

The major disciplinary recommendations provide for the referral of all civilian equivalent and Jervis Bay Territory Offences to the civilian authorities. The additional recommendations provide for the reform of current structures, in order to protect service personnel's rights in the event that the civilian authorities refer criminal activity back to the military for prosecution. The additional recommendations cover the prosecution, defence and adjudication functions, recommending the creation of a Director of Military Prosecutions, Director of Defence Counsel Service and a new tribunal system**. All recommendations are based on the premise that the prosecution, defence and adjudication functions should be conducted completely independent of the ADF.**

Major recommendations

Recommendation 1

3.119 The committee recommends that all suspected criminal activity in Australia be referred to the appropriate State/Territory civilian police for investigation and prosecution before the civilian courts.

Recommendation 2

3.121 The committee recommends that the investigation of all suspected criminal activity committed outside Australia be conducted by the Australian Federal Police.

Additional recommendations

Recommendation 3

3.124 The committee recommends that Service police should only investigate a suspected offence in the first instance where there is no equivalent offence in the civilian criminal law.

Recommendation 4

3.125 The committee recommends that, where the civilian police do not pursue a matter, current arrangements for referral back to the service police should be retained. The service police should only pursue a matter where proceedings under the DFDA

can reasonably be regarded as substantially serving the purpose of maintaining or enforcing service discipline.

Recommendation 5

3.130 The committee recommends that the ADF increase the capacity of the Service police to perform their investigative function by:

- Fully implementing the recommendations contained in the Ernst & Young Report;
- Encouraging military personnel secondments and exchanges with civilian police authorities;
- Undertaking a reserve recruitment drive to attract civilian police into the Defence Forces;
- Increasing participation in civilian investigative training courses; and
- Designing clearer career paths and development goals for military police personnel

Recommendation 6

3.134 The committee recommends that the ADF conduct a tri-service audit of current military police staffing, equipment, training and resources to determine the current capacity of the criminal investigations services. This audit should be conducted in conjunction with a scoping exercise to examine the benefit of creating a tri-service criminal investigation unit.

Recommendation 7

4.44 The committee recommends that all decisions to initiate prosecutions for civilian equivalent and Jervis Bay Territory offences should be referred to civilian prosecuting authorities.

Recommendation 8

4.45 The committee recommends that the Director of Military Prosecutions should only initiate a prosecution in the first instance where there is no equivalent or relevant offence in the civilian criminal law. Where a case is referred to the Director of Military Prosecutions, an explanatory statement should be provided explaining the disciplinary purpose served by pursuing the charge.

Recommendation 9

4.46 The committee recommends that the Director of Military Prosecutions should only initiate prosecutions for other offences where the civilian prosecuting authorities do not pursue a matter. The Director of Military Prosecutions should only pursue a matter where proceedings under the DFDA can reasonably be regarded as substantially serving the purpose of maintaining or enforcing Service discipline.

Recommendation 10

4.47 The committee recommends that the Government legislate as soon as possible to create the statutorily independent Office of Director of Military Prosecutions.

Recommendation 11

4.48 The committee recommends that the ADF conduct a review of the resources assigned to the Office of the Director of Military Prosecutions to ensure it can fulfil its advice and advocacy functions and activities.

Recommendation 12

4.49 The committee recommends that the ADF review the training requirements for the Permanent Legal Officers assigned to the Office of the Director of Military Prosecutions, emphasising adequate exposure to civilian courtroom forensic experience.

Recommendation 13

4.50 The committee recommends that the ADF act to raise awareness and the profile of the Office of the Director of Military Prosecutions within Army, Navy and Air Force.

Recommendation 14

4.51 The committee recommends that the Director of Military Prosecutions be appointed at one star rank.

Recommendation 15

4.52 The committee recommends the remuneration of the Director of Military Prosecutions be adjusted to be commensurate with the professional experience required and prosecutorial function exercised by the office-holder.

Recommendation 16

4.75 The committee recommends that all Permanent Legal Officers be required to hold current practicing certificates.

Recommendation 17

4.76 The committee recommends that the ADF establish a Director of Defence Counsel Services.

Recommendation 18

5.94 The committee recommends the Government amend the DFDA to create a Permanent Military Court capable of trying offences under the DFDA currently tried at the Court Martial or Defence Force Magistrate Level.

Recommendation 19

5.95 The Permanent Military Court to be created in accordance with Chapter III of the Commonwealth Constitution to ensure its independence and impartiality.

- Judges should be appointed by the Governor-General in Council;
- Judges should have tenure until retirement age.

Recommendation 20

5.97 The committee recommends that Judges appointed to the Permanent Military Court should be required to have a minimum of five years recent experience in civilian courts at the time of appointment.

Recommendation 21

5.100 The committee recommends that the bench of the Permanent Military Court include judges whose experience combines both civilian legal and military practice.

Recommendation 22

5.104 The committee recommends the introduction of a right to elect trial by court martial before the Permanent Military Court for summary offences.

Recommendation 23

5.106 The committee recommends the introduction of a right of appeal from summary authorities to the Permanent Military Court.

The administrative system

This report has also identified serious problems with the administrative component of the military justice system. The problems emerge at the very earliest stage of reporting a complaint or lodging a grievance and carry through into the final stages of review or appeal. The problems are not new—they have dogged the system for many years—nor are they confined to specific ranks or areas of the Forces. Young recruits and senior officers, female and male members across the three services engaged in the full range of military activities have given evidence before the committee raising their concerns about the military justice system.

The committee accepts that, on face value, there is 'a system of internal checks and balances, of review and counter review'. The overall lack of rigour to adhere to the rules, regulations and written guidelines, the inadequate training of investigators, the potential and real conflicts of interest, the failure to protect the most basic rights of those caught up in the system and the inordinate delays in the system rob it of its very integrity. The committee believes that measures must be taken to build greater confidence in the system and most importantly to combat the perception that the system is corrupted by its lack of independence. The committee is recommending a major restructuring of the administrative system, in particular the establishment of a statutorily independent grievance review board.

Major recommendations

Recommendation 29

11.67 The committee makes the following recommendations—

a) The committee recommends that:

- the Government establish an Australian Defence Force Administrative Review Board (ADFARB);
- the ADFARB to have a statutory mandate to review military grievances and to submit its findings and recommendations to the CDF;
- the ADFARB to have a permanent full-time independent chairperson appointed by the Governor-General for a fixed term;
- the chairperson, a senior lawyer with proven administrative law/policy experience, to be the chief executive officer of the ADFARB and have supervision over and direction of its work and staff;
- all ROG and other complaints be referred to the ADFARB unless resolved at unit level or after 60 days from lodgement;
- the ADFARB be notified within five days of the lodgement of an ROG at unit level with 30 days progress reports to be provided to the ADFARB;

- the CDF be required to give a written response to ADFARB findings/recommendations;
- if the CDF does not act on a finding or recommendation of the ADFARB, he or she must include the reasons for not having done so in the decision respecting the disposition of the grievance or complaint;
- the ADFARB be required to make an annual report to Parliament.

b) The committee recommends that this report

- contain information that will allow effective scrutiny of the performance of the ADFARB;
- provide information on the nature of the complaints received, the timeliness of their adjudication, and their broader implications for the military justice system—the Defence Force Ombudsman's report for the years 2000–01 and 2001–02 provides a suitable model; and
- comment on the level and training of staff in the ADFARB and the adequacies of its budget and resources for effectively performing its functions.

c) The committee recommends that in drafting legislation to establish the ADFARB, the Government give close attention to the Canadian National Defence Act and the rules of procedures governing the Canadian Forces Grievance Board with a view to using these instruments as a model for the ADFARB. In particular, the committee recommends that the conflict of interest rules of procedure be adopted. They would require:

- a member of the board to immediately notify the Chairperson, orally or in writing, of any real or potential conflict of interest, including where the member, apart from any functions as a member, has or had any personal, financial or professional association with the grievor; and
- where the chairperson determines that the Board member has a real or potential conflict of interest, the Chairperson is to request the member to withdraw immediately from the proceedings, unless the parties agree to be heard by the member and the Chairperson permits the member to continue to participate in the proceedings because the conflict will not interfere with a fair hearing of the matter.

d) The committee further recommends that to prevent delays in the grievance process, the ADF impose a deadline of 12 months on processing a redress of grievance from the date it is initially lodged until it is finally resolved by the proposed ADFARB. It is to provide reasons for any delays in its annual report.

e) The committee also recommends that the powers conferred on the ADFARB be similar to those conferred on the CFGB. In particular:

- the power to summon and enforce the attendance of witnesses and compel them to give oral or written evidence on oath or affirmation and to produce any documents and things under their control that it considers

necessary to the full investigation and consideration of matters before it; and

- although, in the interest of individual privacy, hearings are held in-camera, the chairperson to have the discretion to decide to hold public hearings, when it is deemed the public interest so requires.

f) The committee recommends that the ADFARB take responsibility for and continue the work of the IGADF including:

- improving the training of investigating officers;
- maintaining a register of investigating officers, and
- developing a database of administrative inquiries that registers and tracks grievances including the findings and recommendations of investigations.

g) To address a number of problems identified in administrative inquiries at the unit level—notably conflict of interest and fear of reprisal for reporting a wrongdoing or giving evidence to an inquiry—the committee recommends that the ADFARB receive reports and complaints directly from ADF members where:

- the investigating officer in the chain of command has a perceived or actual conflict of interest and has not withdrawn from the investigation;
- the person making the submission believes that they, or any other person, may be victimised, discriminated against or disadvantaged in some way if they make a report through the normal means; or
- the person has suffered or has been threatened with adverse action on account of his or her intention to make a report or complaint or for having made a report or complaint.

h) The committee further recommends that an independent review into the performance of the ADFARB and the effectiveness of its role in the military justice system be undertaken within four years of its establishment.

Recommendation 34

12.120 The committee recommends that:

- all notifiable incidents including suicide, accidental death or serious injury be referred to the ADFARB for investigation/inquiry;
- the Chairperson of the ADFARB be empowered to decide on the manner and means of inquiring into the cause of such incidents (the Minister for Defence would retain absolute authority to appoint a Court of Inquiry should he or she deem such to be necessary);
- the Chairperson of the ADFARB be required to give written reasons for the choice of inquiry vehicle;

- the Government establish a military division of the AAT to inquire into major incidents referred by the ADFARB for investigation; and
- the CDF be empowered to appoint a Service member or members to assist any ADFARB investigator or AAT inquiry.

Additional recommendations

Recommendation 24

7.98 In line with Australian Standard AS 8004–203, Whistleblower Protection Programs for Entities, the committee recommends that:

- the ADF's program designed to protect those reporting wrongdoing from reprisals be reviewed regularly to ensure its effectiveness; and
- there be appropriate reporting on the operation of the ADF's program dealing with the reporting of wrongdoing against documented performance standards (see following recommendation).[52]

Recommendation 25

7.103 The committee recommends that, in its Annual Report, the Department of Defence include a separate and discrete section on matters dealing with the reporting of wrongdoing in the ADF. This section to provide statistics on such reporting including a discussion on the possible under reporting of unacceptable behaviour. The purpose is to provide the public, members of the ADF and parliamentarians with sufficient information to obtain an accurate appreciation of the effectiveness of the reporting system in the ADF.

Recommendation 26

8.12 The committee recommends that the Defence (Inquiries) Manual include at paragraph 2.4 a statement that quick assessments while mandatory are not to replace administrative inquiries.

Recommendation 27

8.78 The committee recommends that the language in the Administrative Inquiries Manual be amended so that it is more direct and clear in its advice on the selection of an investigating officer.

Recommendation 28

8.81 The committee recommends that the following proposals be considered to enhance transparency and accountability in the appointment of investigating officers:

- Before an inquiry commences, the investigating officer be required to produce a written statement of independence which discloses professional and personal relationships with those subject to the inquiry and with the

52 Standards Australia, Australian Standard AS 8004–2003, paras 2.4.3 and 2.4.4.

complainant. The statement would also disclose any circumstances which would make it difficult for the investigating officer to act impartially. This statement to be provided to the appointing authority, the complainant and other persons known to be involved in the inquiry.

- A provision to be included in the Manual that would allow a person involved in the inquiry process to lodge with the investigating officer and the appointing officer an objection to the investigating officer on the grounds of a conflict of interest and for these objections to be acknowledged and included in the investigating officer's report.
- The investigating officer be required to make known to the appointing authority any potential conflict of interest that emerges during the course of the inquiry and to withdraw from the investigation.
- The investigating officer's report to include his or her statement of independence and any record of objections raised about his or her appointment and for this section of the report to be made available to all participants in the inquiry.

Recommendation 30

11.69 The committee recommends that the Government provide funds as a matter of urgency for the establishment of a task force to start work immediately on finalising grievances that have been outstanding for over 12 months.

Recommendation 31

12.30 The committee recommends that the language used in paragraphs 7.56 of the Defence (Inquiry) Manual be amended so that the action becomes mandatory.

Recommendation 32

12.32 Similarly, the committee recommends that the wording of paragraph 7.49 be rephrased to reflect the requirement that a member who comes before the Board late in the proceedings will be allowed a reasonable opportunity to familiarise themselves with the evidence that has already been given.

Recommendation 33

12.44 The committee recommends that the wording of Defence (Inquiry) Regulation 33 be amended to ensure that a person who may be affected by an inquiry conducted by a Board of Inquiry will be authorized to appear before the Board and will have the right to appoint a legal practitioner to represent them.

12.45 Further that a regulation be promulgated by the ADF that a person who has died as a result of an incident under investigation by a BOI will be entitled to legal representation.

Recommendation 35

13.19 Building on the report by the Australian Law Reform Commission, *Principled Regulation: Federal Civil and Administrative Penalties in Federal Jurisdiction*, the

committee recommends that the ADF commission a similar review of its disciplinary and administrative systems.

Recommendation 36

13.27 The committee recommends that the committee's proposal for a review of the offences and penalties under the Australian military justice system also include in that review the matter of double jeopardy.

Recommendation 37

13.29 The committee recommends that the ADF submit an annual report to the Parliament outlining (but not limited to):

(d) The implementation and effectiveness of reforms to the military justice system, either in light of the recommendations of this report or via other initiatives.

(e) The workload and effectiveness of various bodies within the military justice system, such as but not limited to;

- Director of Military Prosecutions
- Inspector General of the ADF
- The Service Military Police Branches
- RMJ/CJA
- Head of Trial Counsel
- Head of ADR.

Recommendation 38

14.46 To ensure that the further development and implementation of measures designed to improve the care and control and rights of minors in the cadets are consistent with the highest standards, the committee suggests that the ADF commission an expert in the human rights of children to monitor and advise the ADF on its training and education programs dealing with cadets.

Recommendation 39

14.62 The committee recommends that the ADF take steps immediately to draft and make regulations dealing with the Australian Defence Force Cadets to ensure that the rights and responsibilities of Defence and cadet staff are clearly defined.

Recommendation 40

14.63 The committee recommends that further resources be allocated to the Australian Defence Force Cadets to provide for an increased number of full-time, fully remunerated administrative positions across all three cadet organisations. These positions could provide a combination of coordinated administrative and complaint handling support.

Chapter 1

Introduction and conduct of the inquiry

Referral of the inquiry

1.1 On 30 October 2003, the Senate referred the matter of the effectiveness of Australia's military justice system to the Senate Foreign Affairs, Defence and Trade References Committee for inquiry and report by 12 May 2004.

1.2 On 1 April 2004, the Committee sought and was granted an extension of time to report on 5 August 2004. Given the nature, complexity and volume of information received, the Senate, on 23 June 2004, granted an extension of time to present an interim report by 9 September 2004. Following the prorogation of Parliament on 31 August 2004, the Committee tabled a short interim report on 8 September 2004. In that report, the Committee explained that it would present a final report as soon as practicable.

1.3 On 6 December 2004, the Senate adopted the Committee's recommendation that the Committee re-adopt the inquiry into the effectiveness of Australia's military justice system with a reporting date of 17 March 2005. On 15 March, the Senate agreed to an extension to report to 10 May 2005 that was further extended to 16 June.

Terms of reference

1.4 A number of inquiries into aspects of Australia's military justice system have been held over recent years. They clearly identified shortcomings in the system and made recommendations to improve it. Despite assurances from the ADF that measures have been taken to correct these failings, reports have continued to surface suggesting that problems persist. Against this background, the Senate adopted the motion:

(1) That the following matters be referred to the Committee for inquiry and report:

(a) the effectiveness of the Australian military justice system in providing impartial, rigorous and fair outcomes, and mechanisms to improve the transparency and public accountability of military justice procedures; and

(b) the handling by the Australian Defence Force (ADF) of:

(i) inquiries into the reasons for peacetime deaths in the ADF (whether occurring by suicide or accident), including the quality of investigations, the process for their instigation, and implementation of findings,

(ii) allegations that ADF personnel, cadets, trainees, civilian employees or former personnel have been mistreated,

(iii) inquiries into whether administrative action or disciplinary action should be taken against any member of the ADF, and

(iv) allegations of drug abuse by ADF members.

(2) Without limiting the scope of its inquiry, the committee shall consider the process and handling of the following investigations by the ADF into:

(a) the death of Private Jeremy Williams;

(b) the reasons for the fatal fire on the HMAS *Westralia*;

(c) the suspension of Cadet Sergeant Eleanore Tibble;

(d) allegations about misconduct by members of the Special Air Service in East Timor; and

(e) the disappearance at sea of Acting Leading Seaman Gurr in 2002.

(3) The Committee shall also examine the impact of Government initiatives to improve the military justice system, including the Inspector General of the ADF and the proposed office of Director of Military Prosecutions.

1.5 On 12 February 2004, the Committee sought a variation to its terms of reference in relation to Cadet Sergeant Eleanore Tibble. The Committee's original terms of reference referred to the handling by the ADF of the investigation into her death. When the Committee was informed that the investigation undertaken by the ADF was into the administrative processes and procedures surrounding the *suspension* of Cadet Sergeant Tibble, it sought successfully to have its terms of reference address the investigation undertaken by the ADF.

Conduct of the inquiry

Advertisement

1.6 The Committee advertised the terms of reference and called for submissions in *The Australian* on a number of occasions leading up to the close of submissions on 12 February 2004, as well as placing an advertisement in two issues of *Navy News*, *Army News* and *Air Force News*.

Submissions

1.7 The Committee received 71 public submissions, 63 confidential submissions, and many supplementary submissions. Public submissions are listed at Appendix 1.

1.8 The submissions came from a wide variety of backgrounds and experience. They represent the interests of people of all ranks ranging from a 15-year-old female cadet to a 50-year-old male two-star general equivalent. They include serving and ex-serving personnel, general service and specialist officers and other ranks from the three services, legal officers and health professionals, police and convicted persons, civilian Defence employees and Equity officers, mental health and social workers,

community and returned service groups and the next of kin of deceased members. Both complainants and those complained about have lodged submissions.

1.9 It is beyond the remit of the Committee to determine the veracity or otherwise of each and every claim, or to pursue individual remedies for all of the complainants. Even so, the Committee considered carefully all the evidence and from the specific experiences of individuals was able to gain an appreciation and understanding of how Australia's military justice system operates and to identify its strengths and weaknesses.

1.10 The committee notes from the outset that although many witnesses who gave evidence to this inquiry were highly critical of aspects of the military justice system, they, nonetheless, continued to hold the ADF and its members in the highest regard. Their primary motive in raising their concerns was to ensure that shortcomings in Australia's military justice system were identified and rectified.

Public hearings

1.11 The Committee held eleven public hearings and seven *in–camera* hearings. Public hearings were held in Canberra, Brisbane, Hobart, Melbourne and Adelaide. A list of the Committee's public hearings, together with the names of witnesses who appeared, is at Appendix 2.

Confidential material

1.12 The committee received a number of submissions and additional information in confidence and took some evidence in camera. Much of this information was of a highly personal nature and in some cases reflected adversely on named individuals. The committee was of the view that the experiences of people or information related to the committee in confidence should be appropriately represented in the report. To do so, the committee used different approaches. In some cases, the report contains quotes taken from this confidential material without identifying the source, in others, where the author agreed for sections of his or evidence to be made public, the report identifies the author. The committee also received staff-in-confidence documents from the ADF. Where the committee felt that material contained in such reports was relevant to the terms of reference and should be disclosed in the public interest, it has reproduced this material. It has taken care, however, to ensure that the disclosure of this information does not infringe privacy rights nor cause unnecessary embarrassment to any individual.

1.13 On the point of confidential material, the committee also notes that Defence has not had the opportunity to receive and respond to most of that material. This has been an inherent tension in the inquiry and the committee notes the limitations this has placed on Defence. However, the committee also notes that in several instances where public and contentious material was forwarded to Defence for comment, none was forthcoming. The committee believes that the evidence on the public record is a more than adequate representation of the actual evidence received.

Briefings

1.14 The Committee received a detailed briefing from the Director General of the Defence Legal Service, the Inspector-General of the ADF and the Director Military Prosecutions on the aspects of the military justice system on 12 February 2004. In addition, the Committee visited the School of Infantry at Singleton and the Jeremy Williams Rehabilitation Facility at Holsworthy on 8 June 2004. The committee acknowledges, and expresses its appreciation for, the time and effort taken by the CDF, service chiefs and other senior ADF members as well as the Tiger team for their assistance during the inquiry.

Provision of expert legal assistance

1.15 In recognition of the nature and complexity of this inquiry, the Committee called for expressions of interest from legal experts. From this process, the Committee selected Mr Michael Griffin to assist in the analysis of its evidence.

1.16 Mr Griffin is a practicing solicitor with Spooner & Hall and holds Bachelor of Laws and Master of Laws degrees from the University of New South Wales. Mr Griffin was recently cleared for promotion to Brigadier and has 30 years military service, including 22 years regular Army. Mr Griffin is a Judge Advocate and Defence Force Magistrate and holds the appointment as Member of the Administrative Appeals Tribunal. In addition, Mr Griffin is a member of the International Association of Refugee Law Judges and was recently appointed to the Administrative Law Committee of the Law Society of NSW. He is a former Member of the Refugee Review Tribunal and the Migration Review Tribunal.

Scope of the inquiry

1.17 In order to evaluate Australia's current military justice system, the Committee considered the findings of numerous previous inquiries and studies conducted over the last ten years into aspects of the system. In doing so, the Committee sought to identify any common problems prevalent throughout this period. It also wanted to assess the effectiveness of any changes made to the military justice system as a result of measures taken following the recommendations coming out of these inquiries.

1.18 Furthermore, during the course of the inquiry, the Committee became increasingly aware of important matters that bore a direct relation to the application of the military justice system. Such issues, which can be referred to broadly as 'corporate management issues', include the status and administration of cadets, the management of drugs and alcohol, the identification and treatment of post-traumatic stress disorder and other mental health issues, and overall organisational accountability.

1.19 To gain a broader understanding of how military justice systems operate in different jurisdictions, the Committee also examined recent developments in the application of military justice in the United Kingdom and Canada.

Structure of the report

1.20 There are two streams to the military justice system, disciplinary processes and administrative processes. This report attempts to identify the principal issues raised in evidence in respect of each of these streams.

1.21 The evidence before the Committee ranged across many aspects of the military justice system and clear themes emerged as witnesses detailed their experiences and gave their views. The major concerns raised by participants in the inquiry determined the overall shape of the report which clearly focuses on determining the effectiveness of the Australian military justice system in providing impartial, rigorous and fair outcomes.

1.22 In taking this approach, the report, while examining all the terms of reference, does not follow the order of matters as set down in the terms of reference. The particular matters and cases referred to the Committee for inquiry are used to highlight broader concerns and are incorporated in the report where they best illustrate issues under consideration.

1.23 The report is divided into four parts and covers the following main topics.

Part 1—Introduction

- Introduction and Conduct of the Inquiry
- Background to the military justice system.

Part 2—The disciplinary system

- Disciplinary investigations conducted by the Service Police.
- Decisions to initiate and conduct prosecutions, and the legal services available for the conduct of prosecutions and the defence of Service members.
- The structure of disciplinary tribunals.

Part 3—The administrative system

- The avenues for reporting wrongdoing and making a complaint including the reporting of unacceptable behaviour relying on the Jeremy Williams case to highlight problems.
- Routine and investigating officer inquiries and the experiences of many members of the ADF and their families and friends who have been involved in an administrative inquiry.
- The review and appeal channels available in the administrative system comprising both the internal and external mechanisms of review and appeal including the Notice to Show Cause, the Redress of Grievance process, the Inspector-General of the Australian Defence Force and the Defence Force Ombudsman.

- Boards of inquiry giving particular attention to the inquiries established to investigate the fire onboard HMAS *Westralia* and the disappearance of Acting Leading Seaman Cameron Gurr.
- Offences and penalties under the military justice system.

Part 4—Other important matters that relate to Australia's military justice system

- The Australian Defence Force Cadets; and
- Mental health services.

Acknowledgments

1.24 The Committee wishes to express its appreciation to everyone who contributed to the inquiry by making submissions, providing additional information or appearing before it to give evidence. It especially acknowledges and thanks those participating in the inquiry who found giving evidence particularly difficult.

Chapter 2

Australia's military justice system: an overview

> The ADF has a military justice system to support commanders and to ensure effective command at all times. It is vital to the successful conduct of operations and to facilitate its activities during peacetime, including the maintenance of operational preparedness. Establishing and maintaining a high standard of discipline in both peace and on operations is essential for effective day-to-day functioning of the ADF and is applicable to all members of the ADF. The unique nature of ADF service demands a system that will work in both peace and armed conflict. Commanders use the military justice system on a daily basis. It is an integral part of their ability to lead the people for whom they are responsible. Without an effective military justice system, the ADF would not function…Discipline is much more an aid to ADF personnel to enable them to meet the challenges of military service than it is a management tool for commanders to correct or punish unacceptable behaviour that could undermine effective command and control in the ADF. Teamwork and mutual support of the highest order are essential to success. Obedience to lawful direction is an intrinsic requirement expected from the most junior to the most senior members of the ADF.[1]

2.1 The military justice system exists to support the peacetime and operational activities of the Australian Defence Force (ADF), serving to maintain discipline and reinforce the chain of command. The military justice system has two distinct but interrelated elements: the discipline system and the administrative system.

2.2 This chapter provides a very brief overview of the main processes and players within the military justice system. Its intention is to inform subsequent discussion rather than provide a comprehensive description of the system.

The Structure of the Australian Defence Force

2.3 Before considering the military justice system, it is useful to provide an initial outline of the structure of the ADF.

2.4 The ADF is constituted under the Defence Act 1903, and its mission is to defend Australia and its national interests.[2] General control and administration of the ADF resides with the Minister for Defence. The Chief of the Defence Force (CDF) and the Secretary of the Department for Defence (the Secretary) are jointly responsible for the administration of the Defence Force, and are accountable to the

---

1 General Peter Cosgrove, Chief of Defence Force, *Submission P16*, pp. 5–6.

2 ibid., p. 1.

Minister. CDF has delegated the command of Navy, Army and Air Force to the respective Service Chiefs.[3]

2.5 The ADF functions through a 'Chain of Command', extending from CDF, through the Service Chiefs, and throughout the entire ADF.[4] Below the statutorily appointed commanders (the CDF and Service Chiefs), are subordinate single Service and joint Commanders of the major environmental or regional commands and Commanding Officers of joint and single Service flotillas, formations, groups, ships, bases, establishments, squadrons and units. All members of the ADF are under command of some nature.[5] A Commander is responsible and accountable for those personnel, assets and activities assigned under his or her command.[6]

2.6 The two branches of the military justice system—the discipline and administrative systems—are designed to support this command and organisational structure.

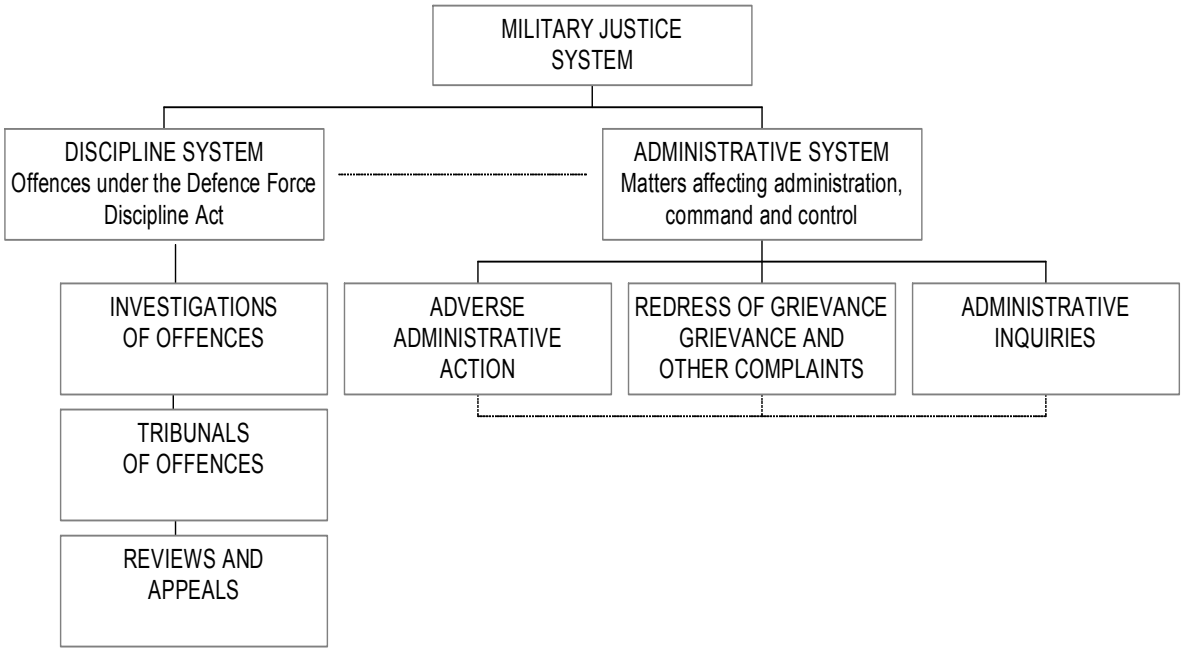


Diagram One: Structure of the Military Justice System.
Source: http://www.defence.gov.au/mjs/mjs.cfm

The discipline system

2.7 The discipline system provides a framework within which disciplinary and criminal offences are investigated and prosecuted, regardless of whether offences are

3 ibid., p. 1.

4 ibid., p. 2.

5 ibid., p. 2.

6 ibid., p. 2.

committed during peacetime or operational activities, within Australia or overseas. The *Defence Force Discipline Act* 1982 (DFDA) underpins the discipline system, providing for the investigation of disciplinary offences, types of offences, available punishments, the creation of Service tribunals, trial procedures before those Service tribunals, and rights of review and appeal.

2.8 The importance of the discipline system to the overall effectiveness of the ADF was a recurrent theme throughout the course of this inquiry. In both his main and supplementary submissions, General Cosgrove reinforced the operational need for an effective discipline system in response to the unique requirements of military service, stating:

> The control and exercise of discipline, through the military justice system, is an essential element of the chain of command. This has not been challenged during the Inquiry and remains a significant distinguishing feature of military justice.[7]

2.9 The Judge Advocate General of the Australian Defence Force, Major-General Justice Roberts-Smith, standing statutorily independent of the ADF chain of command, also endorsed the proposition that the discipline system is vital to the operational effectiveness of the ADF:

> The historical need for a discipline system internal to the military force has been recognised by the High Court of Australia in a number of cases—and I think I have referred to them in my submission. So that need, as I would see it, is beyond debate in terms of principle.[8]

2.10 Mr Neil James of the Australian Defence Association also supported the notion that military discipline is essential to the operational effectiveness of the defence forces. He stated:

> The association considers the following broad philosophical and practical points are relevant to any review of the military justice system. First, a democracy cannot maintain an effective Defence Force without that force being subject to a code of disciplinary legislation that specifically covers the purposes, situations, conditions and exigencies of war. No extension of civil codes of law can, or necessarily should, meet those requirements. This inquiry, therefore, is surely about improving the Defence Force Discipline Act rather than abolishing it. Second, discipline is both a lawful and an operationally essential component of command.[9]

2.11 General Cosgrove also stated that common standards of discipline for peace and on operations are essential:

---

7 General Peter Cosgrove, Chief of Defence Force, *Submission P16F.*

8 Major General Justice Roberts-Smith, Judge Advocate General ADF, *Committee Hansard,* 21 June, p. 43.

9 *Committee Hansard,* 9 June 2004, p. 20.

> Discipline is integral to the effectiveness and efficiency of professional fighting forces. In preparing for armed conflict during times of peace, members of the ADF must behave to those same exacting high standards which will be demanded in the event of armed conflict
>
> …
>
> In both peace and times of armed conflict, the margin for error or omission without tragic consequences will often depend upon inculcated habits of discipline to instantly obey lawful directions and orders…High standards of discipline are integral to military service during peacetime, particularly for a realistic training environment. Disciplinary standards cannot be dependent on the level of readiness at which a particular unit may be held.[10]

2.12 General Cosgrove also asserted that the ability to deal with discipline and criminal conduct under a military code of justice is particularly necessary during operational deployments outside Australia, providing a 'stand alone' code where a civilian jurisdiction may either not apply or does not exist. The discipline system also allows service personnel to be dealt with under Australian law, rather than falling under the jurisdiction of foreign countries or the International Criminal Court.[11] The justifications for the maintenance of a separate and distinct military justice system reflect the unique role the defence forces perform and the standards of conduct demanded from service personnel.

Offences under the Defence Force Discipline Act

2.13 Because of the unique functions performed by the ADF, the military justice system differs significantly from forms of regulation encountered in other employment environments requiring a more stringent degree of discipline and proscribing a broader range of behaviours. The DFDA creates three categories of offence:

- military discipline offences for which there are no civilian counterparts (e.g. absence without leave, insubordinate conduct, disobedience of a command, etc);
- offences with a close civilian criminal law equivalent (such as assault on a superior or subordinate);
- civilian criminal offences imported from the law applicable in the Jervis Bay Territory.

2.14 The incorporation of civilian criminal offences into the discipline system enables the extraterritorial application of Australian laws when members are deployed overseas in circumstances where an adequate criminal law framework is absent, or the application of host country law is otherwise undesirable.

---

10 General Peter Cosgrove, *Submission P16.*

11 General Peter Cosgrove, *Submission P16.*

2.15 Where jurisdictional overlap occurs during peacetime in Australia between the military justice system and the civilian criminal law, jurisdiction under the DFDA can only be exercised where proceedings can reasonably be regarded as substantially serving the purpose of maintaining or enforcing Service discipline. Otherwise, criminal offences or illegal conduct is referred to civilian authorities for investigation and prosecution. Under section 63 of the DFDA, the consent of the Commonwealth Director of Public Prosecutions is required to deal with serious offences (such as murder, manslaughter and certain sexual offences) under military jurisdiction. Where a member is being prosecuted under the civilian criminal justice system, they cannot be subjected to the DFDA for the same or a similar offence.

Service tribunals

2.16 Where offences are prosecuted under military jurisdiction, the DFDA provides for the creation of Service Tribunals with the power to try ADF members. There are three types of tribunal:

- Courts martial (CM);
- Defence Force Magistrates (DFMs); and
- Summary Authorities (SA).

Courts Martial

2.17 There are two levels of Court Martial: General Court Martial (GCM) and Restricted Court Martial (RCM). The procedures for both are essentially the same. The difference between the two lies in the rank of the president, and number of other members.[12] Only military officers can be members of courts martial, and a legal officer acting as Judge Advocate is always present. Members are currently appointed by the convening authority, through authority extending through the chain of command from the CDF. This may change following the implementation of legislation originally scheduled for introduction into Parliament during 2004.[13] Under the proposed changes, the Registrar of Military Justice (RMJ) will convene courts martial and appoint panel members, although this will still occur through the command chain extending from CDF.[14]

Defence Force Magistrates

2.18 DFMs have the same jurisdiction and powers as an RCM and provide an alternative to Courts Martial for dealing with serious offences. DFMs must be military

12 A GCM comprises a President, who is not below the rank of Colonel, and not less than four other members. An RCM comprises a President who is not below the rank of Lieutenant Colonel, and not less than two other members.

13 As at the publishing date of this report, no such legislation had been introduced into Parliament.

14 General Peter Cosgrove, Chief of Defence Force, *Submission P16*, p. 19.

legal officers and are appointed by the Judge Advocate General (JAG), by authority of the chain of command extending from the CDF.

Summary Authorities

2.19 Summary Authorities have limited powers of punishment and are generally used to try less serious offences. There are three levels of SA: Subordinate Summary Authority (SSA), Commanding Officer (CO) and Superior Summary Authority. Only officers of the ADF may be appointed as Summary Authorities. Summary Authorities are also appointed through the chain of command extending from CDF.

2.20 The DFDA also provides for the appointment of Discipline Officers to deal with acts or omissions that are otherwise capable of being charged as Service offences under the DFDA. The Discipline Officer system allows for the expeditious handling of minor infractions committed by non-commissioned rank and officer cadets, and applies where the member admits the misconduct and there is no dispute as to the facts.

Reviews and appeals

2.21 The DFDA provides for a number of review and appeals processes.

2.22 All SSA convictions and punishments must be automatically reviewed by the CO and include an examination by a Service lawyer, who may transmit the review to a reviewing authority.[15]

2.23 Service offences convicted by a Service Tribunal are automatically reviewed by a reviewing authority.[16] Further review is possible by lodgement of a petition to the reviewing authority by the convicted member.[17] It is also possible for further review by the relevant Service Chief or CDF.[18]

2.24 Convictions (but not punishments) handed down from Courts Martial or DFMs may also be appealed to the Defence Force Discipline Appeals Tribunal (DFDAT).[19] Appeals are only possible on questions of law—appeals concerning questions of fact cannot be made to the DFDAT.[20] The Tribunal is composed of Federal, State and Territory Judges appointed by the Governor-General.

---

15 s. 151 *DFDA* (1982).

16 s. 152 *DFDA* (1982).

17 s. 153 *DFDA* (1982).

18 s. 155 *DFDA* (1982).

19 s. 20(1) *Defence Force Discipline Appeals Act 1955*.

20 s. 20(1) *Defence Force Discipline Appeals Act 1955*.

2.25 Subsequent appeals from a decision of the DFDAT can be lodged, on questions of law only, with the Federal Court.[21] Appeals from the Federal Court may ultimately be lodged with the High Court.

2.26 The Inspector-General of the Australian Defence Force (IGADF) also has capacity to review disciplinary processes.

Provision of legal assistance

2.27 Throughout the investigation, tribunal and appeals processes, legal advice is available to Service personnel at the expense of the Commonwealth.

Key military justice appointments and agencies

2.28 There are a number of agencies and appointments that perform key roles in the Military Justice System.

The Office of the Inspector-General of the ADF

2.29 The inaugural Inspector-General of the Australian Defence Force (IGADF) was appointed by the CDF in January of 2003. The Office of the IGADF was opened in September 2003. Broadly, the Office of the IGADF is intended to provide a mechanism whereby the military justice system is reviewed and audited, independently of the chain of command. The IGADF reports directly to the CDF, and may investigate matters arising from both the discipline and administrative systems.

2.30 The role of the IGADF is to identify systemic causes of injustice within the military justice system, rather than supplant existing avenues of recourse available to individuals. Any person may make a submission to the IGADF, including current and former ADF members, Australian Defence Organisation (ADO) personnel, family members and friends, and members of the public.[22] The IGADF does not have the power to implement measures arising out of his or her investigations. The IGADF's only power is to make recommendations to other authorities who may remedy the matter.[23]

The Defence Legal Service

2.31 The Defence Legal Service (TDLS) provides legal support (including policy advice regarding the operation of the military justice system) to the Defence Organisation. Legal officers provide advice and assistance to commanders concerning the decision to charge and prosecute offences.

---

21 s. 52(1) *Defence Force Discipline Appeals Act 1955*.

22 DI(G) ADMIN 61-1, para. 16.

23 DI(G) ADMIN 61-1, para. 33.

The Director of Military Prosecutions

2.32 The position of the Director of Military Prosecutions (DMP) was created by a Defence Instruction (General) (DI(G)) issued by the CDF and the Secretary, Department of Defence, in July 2003. Currently, the DMP acts in an advisory capacity to convening authorities. It was anticipated that legislation formally establishing the DMP as a statutory appointment would be introduced into Parliament during 2004, but as yet the Government has not done so. If legislation is introduced, the DMP will replace the convening authority as prosecutorial decision maker. The DMP's current functions include conducting prosecutions at court martial and DFM trials and representing the ADF at appellate trials and courts. The DMP may also provide advice to commanders concerning whether to prosecute an individual.

The Registrar of Military Justice

2.33 The Registrar of Military Justice currently deals with the case management of disciplinary justice trials, and is intended to assist in the reduction of delays in the military justice system. Legislative alteration to the role of the RMJ was intended during 2004. When the DMP replaces the convening authority as prosecutorial decision maker, the RMJ will assume responsibility for convening courts martial and DFM trials. It is intended that the RMJ will take on a function analogous to a civilian registrar or court administrator.

The Judge Advocate General

2.34 The Judge Advocate General (JAG) has oversight and control over the operation of the judicial aspects of the discipline system. Under the terms of the DFDA, the JAG must be a judge of either the Federal or a state Supreme Court. The functions of the JAG are to:

- provide an annual report to the Minister Assisting the Minister for Defence on the operation of the DFDA;
- make procedural rules for Service tribunals;
- act as the final avenue of legal review of proceedings within the ADF; and
- appoint DFMs, Judge Advocates and other legal officers.

Chief Judge Advocate

2.35 The statutory position of Chief Judge Advocate (CJA) was created in 2003. The CJA provides administrative assistance to the JAG, and must be a member of the panel of Judge Advocates.

Judge Advocates

2.36 Judge Advocates (JA) are appointed by the JAG, and are Permanent or Reserve legal officers. They are nominated to courts martial to advise, rule and direct on matters of law.

Service Police

2.37 Each of the three Services has a police organisation. All three organisations report to the Provosts-Marshal of the Navy, Army and Air Force, and remain under the ultimate command of the respective Chiefs of Service. Service police are responsible for the prevention, detection and investigation of all offences committed by ADF members.

Administrative system

2.38 The administrative system deals with the decisions and processes associated with the control and administration of the ADF. In a similar vein to structures in many organisations, it is designed to encourage Service personnel to maintain high standards of professional judgement, command and leadership.

2.39 The administrative system broadly comprises an inquiry system, adverse administrative action in response to member conduct, and internal and external review processes.

2.40 It should be emphasised that the administrative system should not operate as a mechanism through which disciplinary offences committed by individuals are punished, nor should it be used to investigate whether ADF members have committed an offence against the DFDA or civilian criminal laws. The administrative system is primarily aimed at improving ADF processes—any adverse findings or recommendations concerning the conduct of members are incidental to this primary purpose.

Administrative inquiries

2.41 Administrative inquiries are conducted to establish the facts surrounding incidents that may affect the ADF. They are initiated by COs for the purpose of determining what happened and why, in order that appropriate action may be taken to prevent the recurrence of similar incidents, or policy and/or systemic improvements may be made. There are two main documents providing guidance and instruction concerning the conduct of administrative inquiries—*The Guide to Administrative Decision Making*[24] and *Administrative Inquiries Manual.*[25]

---

24 ADF Publication 06.1.3.

25 ADF Publication 06.1.4.

2.42 There are five types of administrative inquiry:[26]

- a Routine Inquiry;
- an Investigating Officer (IO) Inquiry under the *Defence (Inquiry) Regulations (D(I)R)*;
- a Board of Inquiry (BOI) under the D(I)R;
- a Combined Board of Inquiry (CBOI) under the D(I)R; and
- a General Court of Inquiry (GCOI) under the D(I)R.

2.43 Each of these types of inquiries has four distinct parts:[27]

- the 'Quick Assessment,' where the nature and gravity of the occurrence, the extent of information required, and type of inquiry needed is determined;
- the Inquiry;
- decisions on recommendations arising from the inquiry; and
- implementation of recommendations.

The Routine Inquiry

2.44 Routine Inquiries derive their authority from the powers of command of the CO and are the only inquiries not established under the D(I)R.[28] They typically involve less complicated matters, and are conducted with as little formality as possible.

Investigating Officer

2.45 IO inquiries deal with matters of a more serious nature than those under routine inquiry, and are governed by the provisions of the D(I)R. They are commonly used by COs to investigate significant matters concerning the ADF, but are not empowered to conduct a criminal or disciplinary investigation nor conclude that an offence has been committed.[29] COs, acting in the capacity of Appointing Authority (AA), may appoint a member of the ADF or a civilian as an IO, and may also appoint one or more officers to act as inquiry assistants.

Boards of Inquiry

2.46 BOIs may be appointed by the CDF, the Secretary, and the Service Chiefs or their delegates. They are empowered to inquire into any matters concerning the

---

26 ADF Publication 06.1.4, para. 1.10.

27 ADF Publication 06.1.4, para. 1.11.

28 ADF Publication 06.1.4, para. 1.21.

29 ADF Publication 06.1.4, para. 6.4.

administration or aspects of the command and control of the ADF, and are typically convened to examine serious incidents. BOIs are not empowered to conduct a criminal or disciplinary investigation or conclude that an offence has been committed.[30] BOIs must have at least two members, one of whom must be an officer. Suitably qualified civilians may also be appointed.[31]

Combined Boards of Inquiry

2.47 CBOIs are established to inquire into matters concerning the ADF and the armed forces of another country. The Minister for Defence or his/her delegate is the AA. This form of inquiry has not been used to date.[32]

General Courts of Inquiry

2.48 GCOI are reserved for the most serious incidents affecting the ADF. The *Administrative Inquiries Manual* provides:

> A General Court of Inquiry may be appointed where there exists a serious national interest in the matters to be the subject of the inquiry and there is a likelihood that an inquiry by the Defence Force may be perceived to be biased because of the involvement, in the matters to be the subject of the inquiry, of the most senior officers of the Australian Defence Force.[33]

2.49 A GCOI is presided over by a Judge or experienced legal practitioner, and is appointed by the Minister for Defence. To date there has been no appointment of a General Court of Inquiry.[34]

Safeguards and rights

2.50 There are a number of safeguards and rights surrounding the conduct of administrative inquiries. Notably, basic administrative law principles have to be conformed with, including affording natural justice to members that might be adversely identified during the course of an inquiry. Such members are entitled to legal advice at the Commonwealth's expense. Evidence collected during administrative inquiries cannot be used for disciplinary or criminal proceedings, with a statutory exception relating offences against the D(I)R.

2.51 Upon completion of an inquiry, a report must be submitted to the AA. The AA must consider the report and ensure that it adequately addresses the terms of reference (TOR), that the evidence supports the findings and the recommendations are

---

30 ADF Publication 06.1.4, para. 7.4.

31 ADF Publication 06.1.4, para. 7.7.a.

32 General Peter Cosgrove, Chief of Defence Force *Submission P16*, p. 24.

33 ADF Publication 06.1.4, para. 8.9.

34 GEN Peter Cosgrove, Chief of Defence Force *Submission P16*, p. 24.

appropriate.[35] As part of this initial review process, the AA must obtain advice from a legal officer. The Legal Officer must review the report and consider whether the investigation satisfactorily addresses the TOR, whether the conclusions are supported by the evidence, and any other relevant matters.[36]

2.52 Where factual findings are made regarding the professional conduct of a member, and adverse administrative action is recommended, that member must be issued with a Notice to Show Cause before any decision is taken to impose adverse administrative action. The Notice should outline the facts and circumstances which are relied upon or taken into account in the decision to initiate the adverse administrative action and any other relevant factors, enclose all evidence, and provide an opportunity for the member to reply.[37] Once the member has responded, the response must be reviewed and a decision made regarding whether or not to proceed with the adverse administrative action. Where adverse administrative action is pursued, review processes are outlined below.

2.53 Where it appears that a member may have committed a disciplinary offence, all or part of an inquiry may be suspended, pending a decision on whether the matter ought to be referred to the Service or civilian police for investigation. Referral may also occur at the conclusion of an inquiry.

The role of civilian authorities

2.54 All injuries or deaths occurring in Australia may be subject to criminal investigation by civilian police or coronial inquiry, irrespective of whether the ADF has conducted its own disciplinary investigation or administrative inquiry.[38] Where possible, the reports of the relevant ADF investigation or inquiry will be made available to the relevant civilian authority.

Adverse administrative action

2.55 Adverse administrative action is taken in response to a member's behaviour or performance, in circumstances where conduct falls below the standards required by the ADF, but does not constitute criminal conduct or warrant the initiation of disciplinary proceedings under the DFDA.[39]

2.56 Adverse administrative action varies in nature, and includes formal warning, censure, removal from duty, reduction in rank, or discharge. It may follow from a DFDA matter, a civilian criminal charge, or an administrative inquiry where the facts

---

35 *Administrative Inquiries Manual*, para. 5.39.

36 *Administrative Inquiries Manual*, para. 5.40.

37 DI(G) PERS 35-6 Annex D, paras 1-8.

38 General Peter Cosgrove, Chief of Defence Force, *Submission P16,* p. 27.

39 DI(G) PERS 35-6, para. 2.

demonstrate that conduct has occurred which is unacceptable for a member of the ADF.

2.57 Policy guidance and/or instruction concerning the initiation of adverse administrative action is found in *The Guide to Administrative Decision Making*.[40]

Internal review mechanisms

2.58 There are a number of internal mechanisms available to review administrative system processes. In the first instance, the ADF prefers that members seek resolution of complaints at the lowest level possible through normal command channels and administrative arrangements.[41] Where the complaint cannot be resolved in this manner, members may lodge a Redress of Grievance (ROG) and/or make a complaint to the IGADF.

Redress of Grievance

2.59 The ROG process provides a formal mechanism whereby complaints may be investigated and reviewed, and where necessary, wrong or unfair decisions or actions may be corrected.[42] Oversight of the ROG system is vested in the Director of the Complaint Resolution Agency (CRA) and the Secretary.[43]

2.60 A complaint through the ROG system may only be made by a member of the ADF, and must be submitted to the member's CO.[44] The CO must then conduct an investigation into whether grounds exist to support the complaint, and where possible, resolve the matter.[45] Where a member is unsatisfied with the result of the CO's investigation, he or she may request that the complaint be referred to the relevant Service Chief, at which time the complaint is forwarded to the CRA. The CRA allocates a case officer to review the complaint on the Service Chief's behalf.

2.61 If the complainant is an officer or warrant officer, and is unsatisfied by the Service Chief's review, the member may request an additional review by CDF.

Inspector General ADF

2.62 As outlined above, the IGADF has the capacity to investigate complaints relating to the operation of the administrative system. In unusual circumstances, a complaint may be lodged with the IGADF irrespective of whether an ROG has been

---

40 ADF Publication 06.1.3.

41 DI(G) PERS 34-1, para. 1.

42 DI(G) PERS 34-1, para. 1.

43 DI(G) PERS 34-1, para. 3.

44 DI(G) PERS 34-1, para. 6.

45 DI(G) PERS 34-1, para. 7.

lodged with a member's CO. This usually occurs when the member feels unable to report concerns to, or has lost confidence in, his or her chain of command.[46]

External review mechanisms

2.63 In addition to the internal review mechanisms available to ADF members, there are a number of external review mechanisms.

Defence Force Ombudsman

2.64 The Defence Force Ombudsman (DFO) is empowered to investigate complaints relating to military inquiries and administrative action, and receives a variety of complaints arising directly from military justice issues. The DFO also receives complaints concerning a broad range of other non-military justice issues arising from the management of the Defence organisation.[47]

2.65 It is standard practice for the DFO to advise complainants to first utilise the ROG process. The DFO does, however, have the capacity to investigate if circumstances strongly indicate that a member may be unable to use the ROG process. Concerned parents, partners or friends of members may also complain to the DFO, but before undertaking an investigation, the DFO requires compelling evidence concerning a member's inability or unwillingness to pursue the issue on his or her own behalf.[48]

Other processes of review

2.66 A member may also lodge a complaint with the Human Rights and Equal Opportunity Commissioner, may make Ministerial representations, and may also appeal to the Federal Court.

Relevant Organisations

2.67 In addition to the organisations and offices outlined above, there are a number of other entities that are relevant to this inquiry.

The Defence Community Organisation

2.68 The Defence Community Organisation (DCO)is the primary means through which Defence provides social work and support services to the families of ADF members. It also supports the ADF chain of command to care for Service personnel.[49] The DCO has some 230 employees working as a network of teams throughout

---

46 DI(G) ADMIN 61-1, para. 17.

47 Prof John McMillan, Defence Force Ombudsman, *Submission P28*, p. 2. (Note: the DFO is not empowered to investigate any action taken under the auspices of the Discipline system.)

48 Professor John McMillan, Defence Force Ombudsman, *Submission P28*, p. 2.

49 General Peter Cosgrove, Chief of Defence Force, *Submission P16F,* pp. 34-35.

Australia. It coordinates the ADF's efforts when a family loses a serving member or is in a crisis situation, providing a broad range of support services and acting as the liaison point between the ADF and the families. The DCO also supports the creation of a network of support for Defence families more generally.

Complaints Resolution Agency

2.69 The Complaints Resolution Agency (CRA) conducts administrative reviews of ROGs referred by ADF members for consideration by the CDF and the three Service Chiefs.[50] It will only investigate a matter if it has been initially dealt with by the CO.

Policy Documents

2.70 The framework within which the military justice system operates comprises legislation, regulations, and policy documents. The main documents relevant to the terms of this inquiry are listed below.

Defence Force Discipline Act

2.71 The DFDA provides the legislative framework for the Discipline system. It creates tribunals to try members of the Defence Force on charges of Service offences against the Act, and also provides these tribunals with powers to try civilians accompanying the Defence Forces on operations. The act creates a system of appeals, and also covers related matters such as:

- investigation of offences;
- suspension from duty; and
- powers of arrest.

2.72 The DFDA is complemented by the *Discipline Law Manual* (DLM). The DLM provides Defence Force members with basic guidance on the law relating to the investigation, hearing and trial of Service offences, the review of proceedings of Service tribunals, and petitions and appeals against Service tribunals.[51]

Defence Regulations

2.73 The Defence (Inquiry) Regulations 1985 set down the provisions governing general courts of inquiry, boards of inquiry, combined boards of inquiry, investigating officers and inquiry assistants and inquiries by the Inspector-General of the Australian Defence Force. Part XV of the Defence Force Regulations 1952 contains provisions relating to the redress of grievance.

---

50 Annex A to DI(G) PERS 34-1.

51 *Discipline Law Manual* ADFP 201, para. 1.14.

Administrative Inquiries Manual (ADF Publication 06.1.4)

2.74 The Administrative Inquiries Manual provides a succinct but comprehensive description of the entire ADF system for the conduct of administrative inquiries. It contains general guidance on methodology, highlights some areas where inquiries could potentially encounter difficulty, and provides guidance concerning the selection of the most appropriate type of administrative inquiry.

Defence Instructions

2.75 Defence Instructions (DI)s are issued by the Secretary and CDF under s9A of the Defence Act 1903. They outline procedures and policies that are to be implemented throughout the ADF. The Chiefs of Army, Navy and Air Force may also issue Defence Instructions applicable within their respective Service. Service DIs must, however, be consistent with the DIs issued by CDF and the Secretary.

2.76 Having outlined the basic military justice framework, attention now turns to the issues arising in the administrative and disciplinary systems.

Part 2

The disciplinary system

Having provided an overview of the military justice system, Part 2 of the report discusses the issues arising in the disciplinary context.

General Peter Cosgrove, Chief of Defence Force, described discipline within the Defence Forces as:

> Essential to command—a non-negotiable requirement for operational effectiveness. For this reason, the control of the exercise of discipline, through the military justice system, is an essential element of the chain of command, from the most junior leader upwards… discipline is much more an aid to ADF personnel to enable them to meet the challenges of military service than it is a management tool for commanders to correct or punish unacceptable behaviour that could undermine effective command and control in the ADF.[52]

Part 2 seeks to identify the various issues surrounding the way discipline is meted out in the ADF. It examines the three major phases of the disciplinary process:

- the investigation of suspected criminal activity by the Service police;
- the provision of legal advice for the initiation and conduct of prosecutions, and the defence of the accused; and
- the structure of disciplinary tribunals.

52 General Peter Cosgrove, Chief of Defence Force *Submission P16*, paras. 2.2–2.4.

Chapter 3

Disciplinary investigations

3.1 Responsibility for investigating suspected contraventions of the DFDA rests with the three Service police forces, under the overall command of the Provosts-Marshal. As the first step in any disciplinary process, investigations are vital to the integrity of the entire system. Inadequately conducted investigations have the potential to profoundly corrupt the operation of subsequent disciplinary mechanisms, thereby inflicting undue hardship on Service men and women.

3.2 It is imperative that disciplinary investigations are rigorous, impartial, and properly executed, with due consideration given to balancing the operational requirements of the ADF against the rights and interests of Service members.

3.3 This chapter has three sections. Section one sets out the framework within which disciplinary investigations are conducted. Section two highlights problems with disciplinary investigations. It briefly outlines shortcomings identified in previous inquiries and reviews the evidence before this inquiry. The third section of this chapter examines the various solutions offered, and outlines the committee's findings and recommendations.

Reporting and investigation of alleged offences

3.4 DI(G) ADMIN 45-2 outlines the primary requirements and common procedures for the reporting, recording and investigation of alleged offences within the Australian Defence Organisation. It describes the roles of commanding officers, managers, and Defence Investigative Authorities (DIA).

3.5 Paragraph 8 of DI(G) ADMIN 45-2 identifies various types of 'notifiable incidents' that must be reported by ADO personnel to a DIA (through the chain of command if necessary). In addition to the specific types of incidents, there are several other factors that personnel should consider when determining whether an incident is notifiable, including whether the incident is 'sensitive, serious, or urgent'. This is determined by considering:

- the likelihood that the incident will bring the ADO into disrepute;
- the likelihood that an incident will attract media or parliamentary attention; and
- the likelihood that an incident may adversely affect the efficiency of the ADO.[1]

---

1 DI(G) ADMIN 45–2, para. 10.

3.6 Where an incident has occurred, the CO or manager should determine whether it is 'notifiable' as soon as possible. All 'notifiable' matters must be reported to a DIA. Some incidents must and/or should be referred to civilian authorities for investigation. DI(G) PERS 45-2 provides guidance for referring matters to civilian police authorities. It states:

> Members of the ADF are subject to the Defence Force Discipline Act and also to the ordinary criminal law of the Commonwealth, States and Territories. The disciplinary provisions of the DFDA serve the purpose of maintaining and enforcing Service discipline. This is different to the purpose served by the criminal law, and justifies a separate existence. However, the DFDA incorporates a number of offences which have recognisable counterparts in the criminal law (for example, assault and theft). This situation gives rise to the question of whether offences under the DFDA which also reveal ordinary criminal offences should be dealt with under the DFDA or by the civil authorities.[2]

3.7 Some offences *must* be referred to civilian police authorities.[3] In the case of other offences, jurisdiction under the DFDA may only be exercised in Australia during peacetime where proceedings under the DFDA can reasonably be regarded as substantially serving the purpose of maintaining Service discipline. In cases where jurisdiction is unclear, the advice of the relevant base, region or command legal officer must be sought.

3.8 DIAs are the Service police organisations that report to the Provosts-Marshal of the Navy, Army and Air Force, the investigative arm within Inspector-General Division, the Fraud Investigation and Recovery Directorate, and the Defence Security Authority.[4] DIAs are primarily responsible for:

- making decisions about whether or not to investigate notifiable incidents;
- preventing, detecting and investigating DFDA offences;
- referring relevant civilian offences to civilian criminal authorities for investigation where required;
- liaising with civilian police authorities and Defence Legal Officers (DLO) about matters referred to civilian authorities;
- determining whether to investigate civilian criminal offences where civilian agencies decline to act;
- conducting investigations; and

---

2 DI(G) PERS 45–1.

3 Such as treason, manslaughter, and certain sexual offences. For more detail see DI(G) PERS 45–2, para. 4.

4 ibid., para. 21.

- providing briefs of evidence to support prosecutions.[5]

3.9 This chapter examines the disciplinary investigation operations of the DIAs, with particular attention on the Service police.

Shortcomings in the investigation of service offences

Previous inquiries

3.10 Previous inquiries conducted by various entities have emphasised the importance of an effectively functioning disciplinary investigations process. Four inquiries in particular have made pertinent observations and recommendations about disciplinary investigations conducted by DIAs:

- the 1998 Commonwealth Ombudsman's *Own Motion Investigation into How the ADF Responds to Allegations of Serious Incidents and Offences*;
- the 1999 Joint Standing Committee on Foreign Affairs, Defence and Trade report, *Military Justice Procedures in the Australian Defence Force*;
- the 2001 Joint Standing Committee on Foreign Affairs Defence and Trade report, *Rough Justice? An Investigation into Allegations of Brutality in the Army's Parachute Battalion*; and
- the 2001 *Report of an Inquiry into Military Justice in the Australian Defence Force*, conducted by Mr J.C.S. Burchett QC.

The 1998 Commonwealth Ombudsman's 'Own Motion Investigation into How the ADF Responds to Allegations of Serious Incidents and Offences'

3.11 On 14 July 1995, General Baker (then CDF) asked the Ombudsman to conduct an 'own motion' investigation into matters surrounding allegations arising from an incident at a Defence base.[6] The Ombudsman's report, released in January 1998, examined the way the ADF responded to serious incidents. It detailed the mechanisms for both disciplinary and administrative investigations, highlighting many systemic flaws, and made a number of recommendations concerning how the military justice system could be more effectively structured.

3.12 The Ombudsman's observations revealed many shortcomings in both disciplinary and administrative investigations. In relation to disciplinary investigations, the Ombudsman noted:

---

5 ibid., para. 26.

6 Commonwealth Ombudsman, *Own Motion Investigation into how the Australian Defence Force Responds to Allegations of Serious Incidents and Offences,* January 1998.

- lack of experience and inappropriate training of those undertaking the investigation;[7]
- inadequate questioning techniques, recording of interviews and statement taking;[8]
- lack of guidance about evidence gathering and analysis;[9] and
- absence of a structured process for supervising or monitoring the progress of investigations.[10]

3.13 The Ombudsman best sums up the nature of the evidence before her at paragraph 5.53 of her Report:

> I consider that there is evidence of a range of problems experienced in the conduct of investigations in cases examined by my office. These have included:
>
> - Inadequate planning of investigations
> - Failure to interview all relevant witnesses and assumptions made about the credibility of witnesses interviewed
> - Pursuit of irrelevant issues in witness interviews, use of inappropriate questioning techniques and failure to put contradictory evidence to witnesses for a response
> - Failure to record evidence properly and, possibly, preparation of witnesses and unauthorised questioning of witnesses
> - Failure to analyse evidence objectively, and to weigh evidence appropriately, thereby leading to flaws in the way conclusions were drawn and findings made, and
> - Inadequate record keeping.[11]

The 1999 Joint Standing Committee on Foreign Affairs, Defence and Trade Report 'Military Justice Procedures in the Australian Defence Force'

3.14 The JSCFADT instigated the *Military Justice* report in 1999 following significant media and public interest in a spate of internal ADF inquiries, and several High Court challenges to the validity of aspects of the DFDA. Many of these inquiries

---

7 ibid., see pars 5.3–5.10 for military police and paras 5.11–5.17 for administrative investigating officers.

8 ibid., paras 5.27–5.32.

9 ibid., paras 5.41–5.47.

10 ibid., paras 6.13 and 6.33. The Ombudsman noted at para. 6.34, that there was 'some monitoring of investigations undertaken by Army and the investigation of complaints of unacceptable sexual behaviour'.

11 ibid., paras 5.54–5.56.

concerned the deaths of Service personnel, or injustices to members of the ADF in their dealings with the military disciplinary system. Criticism was levelled at the execution of internal inquiries and the overall operation of the administrative and disciplinary systems. Questions were also raised concerning natural justice and human rights protections.[12]

3.15 The JSCFADT's examination of the discipline system highlighted several issues including:

- failure to accord procedural fairness to Service personnel, especially in relation to the conduct of secret investigations under the auspices of the DFDA;[13] and
- inadequate education and training in DFDA operation, for both legally and non-legally qualified or educated users.[14]

The 2001 Joint Standing Committee on Foreign Affairs Defence and Trade report 'Rough Justice? An Investigation into Allegations of Brutality in the Army's Parachute Battalion'

3.16 The 2001 report *Rough Justice? An Investigation into Allegations of Brutality in the Army's Parachute Battalion* followed the 1999 JSCFADT *Military Justice* report, and examined allegations of brutality in 3rd Battalion, Royal Australian Regiment (3RAR) committed between 1996 and 1999.

3.17 Although relevant to its terms of reference, the JSCFADT was not made aware of the 3RAR allegations or the ADF investigations during the process of the 1999 *Military Justice* inquiry. The JSCFADT was concerned that information may have been withheld that could have materially affected the recommendations made in the 1999 report.[15]

3.18 The JSCFADT's findings in the *Rough Justice* report about the inadequacies of the Army's military police and the military justice system are of particular interest to this committee's current inquiry. With reference to the Army's military police force, the JSCFADT stated:

---

12 Joint Standing Committee on Foreign Affairs, Defence and Trade, *Military Justice Procedures in the ADF,* June 1999, p. ix.

13 ibid., pp. 101–103.

14 ibid., pp. 150–152.

15 Joint Standing Committee on Foreign Affairs, Defence and Trade, *Rough Justice? An Investigation into Allegations of Brutality in the Army's Parachute Battalion,* April 2001, p. 2.

> It became readily apparent throughout the committee inquiry that there were serious issues regarding the competency of Army Military Police to carry out their policing and investigatory functions.[16]

3.19 The JSCFADT identified concerns about secrecy in the investigation process,[17] poor management practices,[18] inadequate resourcing,[19] and excessively long investigation and offence clearance times.[20] The JSCFADT made several recommendations to improve investigatory procedures, including:

- the establishment of a pool of military investigators for the conduct of military investigations;[21]
- increased exposure of investigators to civilian investigatory bodies as part of their training;[22] and
- an increased role for reserve military police.[23]

The 2001 'Report of an Inquiry into Military Justice in the Australian Defence Force' conducted by Mr J.C.S. Burchett QC

3.20 In December 2000, Admiral Barrie, then CDF, appointed Mr J.C.S. Burchett QC to examine the military justice system. Burchett undertook his examination at roughly the same time as the JSCFADT *Rough Justice* Inquiry. The *Report of an Inquiry into Military Justice in the Australian Defence Force* (the '*Burchett Report*') was completed in July 2001.

3.21 Burchett was empowered to examine broadly the administration of military justice and investigate aspects of the 3RAR allegations. The *Burchett Report* identified several issues relevant to the terms of the current inquiry. The report discussed a number of problematic aspects within the discipline system, and stated 'many of the problems the subject of submissions to the Inquiry had a strong link to a

16 ibid., p. 40.

17 ibid., p. 27.

18 ibid., p. 41.

19 ibid., p. 42.

20 ibid., pp. 42–44.

21 ibid., p. 61.

22 ibid., p. 61.

23 ibid., pp. 44–5.

flawed investigation.'[24] The report identified a number of what it termed 'investigative shortcomings',[25] including:

- delayed investigations;[26]
- unreasonable exertion of CO influence during investigative processes;[27] and
- procedural fairness and competence issues in investigation conduct.[28]

3.22 An analysis of the various inquiries conducted into the disciplinary system over the past decade reveals many recurrent flaws. Every major review has, to varying degrees, highlighted issues such as:

- delay in the conduct of disciplinary investigations;
- inadequate evidence gathering and analysis;
- lack of process monitoring or quality control;
- lack of transparency and contravention of principles of natural justice; and
- inadequate Military police training and guidance in basic military justice procedures, investigation conduct, and application of relevant policies and instructions.

3.23 The committee recognises that the ADF has endeavoured to improve the effectiveness of the disciplinary system in response to the various reports released over the past decade. Despite these efforts, however, repeated inquiries and reports indicate that the same problems continue to arise. Despite almost constant scrutiny, ADF personnel continue to suffer under a system that is seemingly incapable of effectively addressing its own weaknesses.

Difficulties highlighted in this inquiry

3.24 Evidence before the present inquiry reveals that many of the problems outlined in previous reports have continued. The committee has received a number of submissions and heard testimony that either provided anecdotal evidence of flaws in military police investigations, or gave broader policy and procedural insight into

---

24 ibid., p. 19.

25 J.C.S. Burchett, *Report of an Inquiry into Military Justice in the Australian Defence Force,* July 2001. p. 116.

26 ibid., p. 19.

27 ibid., p. 19.

28 ibid., p. 19.

military police operations. The evidence gathered echoed many of the themes from past reports.

Anecdotal evidence

3.25 Anecdotal evidence described delayed investigations; the failure of investigators to pursue exculpatory evidence; investigator's failure to disclose relevant material to the accused; investigator's and commander's failure to advise the accused of allegations at the appropriate time; and investigator's and prosecutor's failure to obtain and/or act on specialist advice. This often led to prosecutor's failure to adequately weigh and assess witness evidence, ultimately leading to deeply flawed prosecutions.

3.26 One circumstance in particular illustrates all that can possibly go wrong in a disciplinary investigation, and the negative consequences that can ensue. This circumstance is described below.

The East Timor SAS Investigation

3.27 The committee was asked in its Terms of Reference to consider the process and handling of the ADF's investigation into allegations of misconduct by members of the Special Air Service (SAS) in East Timor.[29] In considering this term of reference, the committee paid particular attention to the case of the SAS soldier charged with mistreating the corpses of two militiamen. The treatment of the SAS soldier reveals most acutely the inadequacies of the current investigation structure, and the consequences that can flow from investigative failures.[30]

3.28 From the outset, the ADF gave repeated public assurances that the Timor investigations would be conducted to the highest standard. In the media briefing at which the ADF announced its intention to pursue charges against the SAS soldier, Lieutenant General Leahy briefed journalists on the conduct and outcome of the investigations, stating:

> The end result is a rigorous and thorough investigation, and I would like to personally commend all those involved in the investigation for their commitment, their professionalism and their plan [sic] hard work.[31]

3.29 With specific reference to the incident giving rise to the charges against the SAS Soldier, Colonel Fogerty, Director of Personnel Operations, Army, stated 'The

---

29 TOR (2)(d).

30 Discussion in this chapter will be limited to the disciplinary investigation. Other aspects of the SAS Soldier's case will be discussed in other chapters of this report.

31 Lieutenant General Peter Leahy, Chief of Army, 'Defence Media Release: Transcript Media Briefing', 16 April 2003.

investigation into that matter has been particularly thorough'[32] and Lieutenant General Leahy gave assurances that 'a very thorough investigation has been conducted.'[33]

3.30 The committee has received evidence revealing that the matter was grossly mishandled. Indeed, General Cosgrove and Lieutenant General Leahy felt obliged to issue the SAS soldier with a full and unreserved apology, following the findings of an independent inquiry into his treatment.[34]

3.31 Perhaps the duration of the investigation is the most patently obvious shortcoming in the inquiry into the SAS soldier's conduct. The circumstances giving rise to the original allegations of mistreatment occurred in October of 1999. In November of 1999 (then) Major General Cosgrove commissioned a murder investigation into the deaths of the militia men. This investigation was apparently conducted expeditiously and concluded there was no impropriety surrounding the deaths of the two militia men or the conduct of any ADF member.

3.32 Some months later, another investigation began into the deaths of the militia men. This investigation took over three years to complete. Evidence to the committee suggests that this investigation was unnecessarily protracted, and caused unnecessary hardship for the SAS soldier. In his submission to this inquiry, General Cosgrove acknowledged 'the investigation into these two allegations clearly took too long'.[35] The *IGADF-Commissioned Report* into the matter was also highly critical of the delay in the investigation:

> I am of the opinion that the investigation was unnecessarily protracted, with the result that its overall cost could not be justified and it served to exacerbate the pressure upon XXXX in circumstances which ought to have been avoided.[36]

3.33 Moreover, during the three-year investigation, the SAS soldier was not directly questioned about the allegations made against him. In his evidence to the committee, the SAS soldier stated that he only became aware of the allegations

---

32 Colonel Fogerty, Director of Personnel Operations, Army, 'Defence Media Release: Transcript Media Briefing', 16 April 2003.

33 Lieutenant General Peter Leahy, Chief of Army, 'Defence Media Release: Transcript Media Briefing', 16 April 2003.

34 On 23 September 2003, General Cosgrove instructed the IGADF to commission an independent report into the conduct of the SAS soldiers matter. The report shall be herein referred to as the *IGADF-Commissioned Report.* In its entirety the report comprised three documents. *Part A* was dated 31 October 2003, *Part B* dated 28 November 2003, and *Part C* was dated 20 January 2004.

35 General Peter Cosgrove, Chief of Defence Force, *Submission P16*, p. 78.

36 *IGADF Commissioned Report: Part A*, (Confidential Document) p. 37. This document was provided to the committee in confidence and has not been made public.

through colleagues and a series of newspaper reports. A committee member asked the soldier whether the illegal killing allegations were ever put to him. He replied that they were not. He only found out about them when he was charged and given a copy of the Brief of Evidence against him.[37]

3.34 In his submission to this inquiry, General Cosgrove informed the committee that, until recently, it was standard Army Military police practice for persons not to be informed that they were under investigation until the last possible moment. He acknowledged that affected members sometimes became aware of the investigation informally through third parties.[38] This concession reflected the experiences of several submitters to this inquiry.[39]

3.35 Despite the duration of the investigation (3 years and two months from incident to interview), the media attention, and the investigator's indiscrete conduct when interviewing potential witnesses, the SAS soldier told the committee that, he was never informed that he was under investigation.[40]

3.36 When various media organisations began to approach the soldier, his family and his legal representatives, he was only provided with advice and assistance about handling the media attention after repeated requests, and even then the advice was neither timely nor effective. He told the committee that initially his requests for assistance were not acknowledged or responded to. No steps were taken to protect his identity or his family's safety until he repeatedly requested a security assessment which was eventually conducted. He was expected to continue to work as normal, despite the enormous stress he was placed under.[41]

3.37 The committee finds it wholly unacceptable that the soldier was not questioned during the investigation, was not told that he was under investigation (despite its obvious conduct and the concomitant media attention), nor provided with adequate support or assistance in the face of the media glare. This delay, failure to inform, and failure to assist is wholly unsatisfactory. It placed the soldier and his family under extreme pressure, and calls into question claims that the system provides impartial, rigorous and fair outcomes.

3.38 It should be emphasised that the investigation process leading to the corpse-mistreatment charges was part of a major investigation into 19 different allegations of 'wrong doing' in East Timor, ranging from workplace harassment to illegal killing.

---

37 In Camera *Committee Hansard*, 1 March 2003, p. 4.

38 General Peter Cosgrove, Chief of Defence Force, *Submission P16*, p. 74.

39 Mr Geoff Lewis, *Submission P55,* and Confidential *Submissions C4,* and *C37.*

40 Confidential *Submission C4,* p. 17.

41 Confidential *Submission C4,* p. 17.

The part of the investigation specifically pertaining to the SAS soldier originally stemmed from the illegal killing allegations (judged unfounded by an investigation launched by CDF in November 1999). On Lieutenant General Leahy's own admission the impetus for the new investigation arose from rumour and innuendo, rather than any concrete allegation of wrongdoing.[42]

3.39 The investigation into the illegal killing allegations—initiated on the basis of gossip—involved travel to four different countries, interviews with 350 witnesses, and the exhumation of two bodies.[43] The evidence before the committee suggests, however, that despite its duration and the amount of travel, time and effort involved, the quality of the investigation was extremely poor. The SAS soldier gave the committee his perspective:

> The investigation by the service police was inadequate. The material provided by the service police, which formed the basis of the inculpatory witness statements was superficial… lacked particularity, corroboration and concurrence and was not appraised against the statements of the other 55 soldiers present...One of the senior investigators mentioned to the head of the investigative team that some members of the team were too inexperienced, but this was not acted upon. The length of the Service Police investigation was inordinately long and very expensive.
>
> In my case I have been utterly let down by an investigation that has displayed such levels of incompetence that it has embroiled not only the Chief of Army and the Chief of the Defence force, but also the Minister for Defence and has been brought to the attention of the Prime Minister of Australia on several occasions.[44]

3.40 The committee is aware that the soldier's assertions in this regard are wholly substantiated by the *IGADF—Commissioned Report*. The Report detailed a litany of deficiencies in the investigations process, including poor interviewing, flawed evidence gathering and analysis, and failure to adequately weigh or pursue exculpatory evidence. It found that witnesses were essentially 'verballed'—the statements were conclusive rather than descriptive, contained superficial content, irrelevant, prejudicial and emotive material, and hearsay.[45] The Report concluded:

> My finding is that the investigators lacked the necessary experience to conduct interviews of this type and that, although they interviewed every person who was reasonably available to them, the product of these

---

42 In Camera *Committee Hansard,* 5 August 2004, pp. 11–14.

43 Lieutenant General Peter Leahy, Chief of Army, 'Defence Media Release: Transcript Media Briefing', 16 April 2003.

44 Confidential *Submission C4*, p. 22.

45 *IGADF—Commissioned Report: Part A*, p. 31. (Confidential document).

> interviews was not reflected by the effort and the attendant expense involved.[46]

3.41 General Cosgrove's initial submission to this inquiry acknowledged the poor quality of the MP investigation as detailed in the *IGADF-Commissioned Report*. He told the committee:

> The inquiry also criticised the Service police investigation, particularly its duration, the superficial content of the statements of principal witnesses, and the inclusion of inadmissible, emotive material in such statements.[47]

3.42 The committee shares the concerns of the SAS soldier, when he states:

> My case was investigated at the highest level using a triservice investigative task force, yet, through inexperience, delay and indecision, it ended up the fiasco that it is today.[48]

3.43 Unfortunately, the 'fiasco' was extraordinarily expensive. Lieutenant General Leahy indicated in a media release dated 16 April 2003 that the 'direct cost' of the investigation was in the order of $130,000.[49] On 5 November 2003, the committee asked for a breakdown of the 'total cost' of the investigation into the SAS soldier's matter.[50] The question was taken on notice, and the 'direct cost' figure of approximately $130,269 was given, comprising:

Forensic Support	$	7,000
Printing Costs	$	513
Drawing Costs	$	300
Travel and Accommodation	$	122,456
Total[51]	$	130,269

3.44 The committee was concerned that the answer provided by the Department of Defence did not provide the 'total cost' as requested by the committee. On 6 August 2004, the committee again requested that the total cost of the investigation be provided, including travel and accommodation costs, the man hours spent on the investigation, barristers fees and any travel or disbursements incurred by external legal advice, exhumation costs, and any costs relating to expert opinions sought.[52]

---

46 *IGADF—Commissioned Report: Part A*, p. 33. (Confidential document).

47 General Peter Cosgrove, Chief of Defence Force, *Submission P16*, p. 79.

48 In-Camera *Committee Hansard,* 1 March 2004, p. 2.

49 Lieutenant General Peter Leahy, Chief of Army 'Defence Media Release: Transcript Media Briefing', 16 April 2003.

50 Question taken on notice, *Estimates Hansard,* 5 November 2003, p. 71.

51 Department of Defence, Answer to Question on Notice, 5 November 2003.

52 In Camera *Committee Hansard,* 5 August 2004, pp. 6–7.

3.45 Following this explicit request for the total costs of the investigation, the Department of Defence informed the committee that the *IGADF-Commissioned Report* conservatively estimated the investigation to cost in excess of $500,000. This figure includes the $130,000 'direct costs' figure, plus the approximate cost of the salaries for the 18 personnel directly involved in this aspect of the Timor investigations. It does not include the salaries of the senior staff officers in Army Headquarters supervising or supporting the investigation on behalf of Chief of Army, the Federal police investigators who assisted in the matter or the reserve senior counsel who provided advice to the Army on this matter.[53] Half a million dollars would appear, on the facts, to be a very conservative figure.

3.46 The initial investigation into the 6 October incident, undertaken in November 1999, found no grounds for taking further action against any soldier. To the contrary, the accounts before the committee suggest that all soldiers under attack in Suai conducted themselves with integrity and bravery of the highest order. Over half a million dollars was spent, however, on another investigation. This investigation was based on gossip, 'secretly conducted' and incompetently executed.

3.47 Following the release of the Media Statement containing an unreserved apology to the SAS soldier, Lieutenant General Leahy acknowledged during an Estimates hearing that the treatment of the soldier raised serious questions about the quality of disciplinary investigations. Put simply:

> The investigation and some aspects of the service police investigation were of concern.[54]

3.48 The committee concurs, and shares the ADF's concern about the circumstances surrounding the treatment of the SAS soldier and the military police's capacity to perform their investigatory function. Moreover, it has grave concerns that the incompetence and lack of professionalism demonstrated in this soldier's case is not limited to this single instance. The question must inevitably arise—how many other ADF members are adversely affected by inadequately conducted disciplinary investigations? How many ADF members do not have the courage to speak out and just suffer in silence? The SAS soldier's treatment raises fundamental questions about the military police's capability to conduct the complex, serious and major investigations it has the remit to conduct.

3.49 The committee questioned Lieutenant General Leahy about the various shortcomings evidenced in the SAS soldier's case. It was noted that the investigation was initiated at the highest level, was particularly well-resourced, under significant media scrutiny, yet its outcome was described in terms such as ‘superficial content of statements’, ‘inclusion of inadmissible material’ and ‘premature conclusions’, and led

---

53 Department of Defence, Answer to Question on Notice, 5 August 2004.

54 Lieutenant General Peter Leahy, Chief of Army, *Estimates Hansard,* 18 February 2004, p. 77.

to an unreserved apology to the soldier for the mistreatment he was subjected to. A committee member asked what confidence the committee could have in the conduct of other minor matters, given that the ADF's best ended so poorly.

3.50 Lieutenant General Leahy responded by asserting that the system works. He stated that the personnel involved did their best, and the solider was able to complain to the IGADF at the end of the process. That complaint led to the identification of shortfalls, which Army is now attempting to address through the initiation of a review of the military police:

> We are set up to handle certain things; this came as something well beyond what we would normally expect to do. I think that our military police, given the degree of training and the number of them that actually exist, have done a solid job on the way through this. They admit and I admit that they have made some errors. The acceptance of the fact that we need a review, the fact that the review will be reporting in May this year, is acknowledgment that we are seeking very clearly, using the justice system, to improve. I am confident that towards the middle of this year I will see a very positive way forward to make sure that this does not happen again.[55]

3.51 The system in this case clearly did not work, and the committee considers the stated reason for systemic failure—that it was 'something well beyond what we would normally expect to do'—is unacceptable.

3.52 Despite Lieutenant General Leahy's assurances that 'the system works', the committee is simply not convinced that this is the case. Furthermore, the capacity to lodge a complaint should not excuse a flawed process. An unfair process is not cured of defect by mere virtue of a complaints procedure.

Other anecdotal evidence

3.53 Other submissions to the inquiry have provided further examples of shortcomings in the investigations process. Mr Nigel Southam, who served with the Royal Australian Corps of the Military Police for over 20 years, provided an account of inappropriate commanding officer involvement in the investigation process, and the initiation of disciplinary action seemingly in retaliation for Mr Southam's lodgement of a redress of grievance about the conduct of the commanding officer.[56]

3.54 Mr Geoff Lewis detailed a secret investigation, apparently initiated in December 2003, that caused considerable personal hardship. Mr Lewis has been a member of the Army reserve since 1967, and is also an Officer of Cadets in the Australian Army Cadets. Similar to the SAS soldier, Mr Lewis only became aware of

---

55 Lieutenant General Peter Leahy, Chief of Army, *Committee Hansard,* 1 March 2004, pp. 38–39.

56 Mr Nigel Southam, *Submission P19* and *Committee Hansard,* 9 June 2004.

the investigation into his activities through rumours passed on from friends. He was not informed that he was the subject of an investigation, and when he directly contacted the Military police to ascertain the nature of the allegations against him, Mr Lewis was stonewalled. Mr Lewis was never questioned in relation to the allegations made against him, but had inappropriate aspersions cast over his character when the investigator repeatedly contacted his employer. In his view, had he been given the opportunity to make representations about his case to the investigator, the matter could have easily been cleared up.[57]

Systemic evidence

3.55 Anecdotal evidence to the committee has revealed poor quality disciplinary investigations and instances where individuals have endured significant hardship. Insight into the potential root causes for this type of systemic breakdown was provided in submissions from individuals with considerable experience in the various Service police forces. The committee was also interested to receive the Ernst & Young *Review of Military Police Battalion Investigation Capability* (the Ernst & Young Report) which gave additional insight into the operation of the Army's Special Investigations Branch (SIB).

Individual submissions

3.56 Lieutenant Commander Brian Sankey, a member of the Navy for 27 years with 18 years of experience in the Naval Police Coxswain, provided the committee with an insight into the operation of the Royal Australian Navy's police service. He acknowledged that, whilst military police work requires a set of specialised skills for the collection, preservation and presentation of evidence, the training, resourcing, and experience in investigation units is wholly inadequate to support these activities. He noted that Naval investigation units are 'suffering from a severe shortage of qualified and experienced investigators,'[58] and highlighted a number of problems within the Naval Police Coxswain including:

- low priority given to the development and maintenance of policing and investigative skills, compared with the priority accorded to other Service obligations;
- under-staffing in the face of increasing workloads;
- inability to maintain investigatory expertise and proficiency due to the nature of 2-3 year postings (requiring different skills sets);
- low morale; and

57 Mr Geoff Lewis, *Submission P55*, pp. 2–4.

58 Lieutenant Commander Brian Sankey, *Submission P4*, p. 6.

- inadequate preliminary and ongoing training and career development.[59]

3.57 The committee took the opportunity to draw from Mr Southam's military policing experience, in addition to discussing his experiences outlined at para. 3.46, when he appeared before the committee on 9 June 2004. Mr Southam was a member of the Royal Australian Corps of Military Police (RACMP) for over 20 years. His evidence echoed many of the concerns raised by Lieutenant Commander Sankey.

3.58 Mr Southam agreed that generally military police suffer from insufficient training, lack of numbers and overall inadequate resources. He indicated that workloads are increasing, the military police have lost, and continue to lose staff, and there can be up to two year delays on investigations.[60] He also commented that it is increasingly difficult to balance military policing functions with the other requirements of service:

> Quality investigations have occurred, but certainly there seems to be too much else that MPs [Military Police] have to do—That is, be soldiers and try and keep up with other issues that are not MP.[61]

3.59 Mr Southam told the committee there were growing difficulties with attracting quality personnel to a career with the military police, and that generally an MP career was not considered to be prestigious:

> I have worked in non-corps positions as well for over five years in training establishments and I can say that, in all honesty, military police are not held in great regard by other soldiers—not particularly for what they have to do but I guess for the culture that exists.[62]

3.60 Both Lieutenant Commander Sankey and Mr Southam possess significant experience in the military police forces, and both have identified several systemic issues that would indicate that the Service police forces have significant failings—poorly resourced, trained, and motivated. The themes raised by both these witnesses to the inquiry were reiterated in the Ernst & Young Report.

The Ernst & Young 'Review of Military Police Battalion Investigation Capability'

3.61 During the February 2004 Estimates hearings, Lieutenant General Leahy and General Cosgrove indicated that, partly in response to the apparent shortcomings evidenced by the SAS matter, an internal study had been commissioned into the

---

59 ibid.

60 Mr Nigel Southam, *Committee Hansard,* 9 June 2004, p. 72.

61 ibid., p. 73.

62 ibid., p. 73.

operation of the military police's investigatory function.[63] General Cosgrove indicated that this review could be instructive for all three Services:

> I am keenly interested in the outcome of the internal Army sponsored review of military police. The reason for this is that they are the largest policing part of the ADF and there will quite possibly be—almost probably—be some very good insights for the other services about smaller police groups.[64]

3.62 General Cosgrove's submission to this inquiry noted that the study was being conducted by the consultancy firm Ernst & Young, and concerned the 'quality' aspects of the Army's Military Police investigative capability.[65] The *Review of Military Police Battalion Investigation Capability* was completed in July 2004 and provided to the committee in December 2004. In his covering letter enclosing and broadly endorsing the Ernst & Young Report, Lieutenant General Leahy advised the committee:

> The purpose of this review was to analyse the current state of the military police capability and recommend initiatives to move towards a better practice investigative capability…[the report] provides a sound basis for future progress.[66]

3.63 The Report made a number of observations that reflect a number of the problems highlighted in the anecdotal and systemic evidence received during this inquiry. It gave the committee another interesting perspective on the difficulties encountered by Army's disciplinary investigations unit, the Special Investigations Branch (SIB).

3.64 The Ernst and Young report found that the SIB's investigation capability has significant shortcomings and is in need of reform when compared to external investigative standards.[67] The report noted that the SIB has not kept abreast of external reforms directed at professionalising investigations capability; improving organisation effectiveness; improving management efficiency and investigation processes; making greater use of technology; and accepting heightened levels of accountability and governance.[68] Furthermore, the SIB's leadership was found to have put 'little if no effort' into benchmarking against external reforms or embarking on a programme of achieving improved standards since 2000.[69]

---

63 General Peter Cosgrove, Chief of Defence Force, and Lieutenant General Peter Leahy, Chief of Army, *Estimates Hansard,* 18 February 2004, p. 54.

64 General Peter Cosgrove, Chief of Defence, *Estimates Hansard,* 18 February 2004, p. 54.

65 General Peter Cosgrove, Chief of Defence, *Submission P16*, p. 73.

66 Lieutenant General Leahy, Chief of Army, Correspondence dated 29 November 2004.

67 Ernst & Young, *Review of Military Police Battalion Investigation Capability,* p. 5.

68 ibid.

69 ibid.

3.65 The report highlighted inordinate delay in the reporting and investigation of notifiable incidents as a persistent problem;[70] inadequate staffing levels;[71] excessive workload coupled with insufficient manpower and equipment;[72] and a lack of consistency in decision making.[73] The report questioned the competency of SIB investigators to manage major or sensitive investigations, particularly investigations into serious crimes committed overseas;[74] and also identified the presence of a culture within SIB that 'contravenes the investigation principles of impartiality and fairness'.[75]

3.66 Low morale and management's failure to value SIB personnel was also raised as an issue:

> We found many investigators 'want out' and we understand very few 'want in'…We have noted in our comparison with better practices elsewhere, that the effectiveness of SIB is impaired by what we regard as an 'unhealthy' work environment. Old world management practices and attitude on organisational effectiveness within SIB needs a fundamental rethink…The exercise of an autocratic fear based control paradigm adversely impacts upon productivity and performance—as well as stifling innovation…Management's interest seems to be intent on getting the job done at the expense of the social and family life of investigators.[76]

3.67 These factors are all severely impacting upon the operational effectiveness of the SIB, and affecting recruitment and retention rates:

> We believe Army is in a desperate situation with regard to attracting sufficient numbers of skilled personnel to its investigation capability.[77]

3.68 The report stated:

> We found in our review of the SIB against the Statement of Work that:
>
> - the investigative capability is unsustainable under current arrangements and conditions;
> - aspects of the culture are inappropriate to the internal investigation function;
> - organisational effectiveness is constricted;

---

70 ibid., pp. 21, 34.

71 ibid., p. 17.

72 ibid., p. 37.

73 ibid.

74 ibid., p. 5.

75 ibid., p. 27.

76 ibid., pp. 20–21.

77 ibid., p. 28.

- investigation processes are inefficient;
- management tools, including case management are inadequate;
- some degree of management inertia exists in relation to continuous improvement; and
- the wellbeing of investigators is a secondary consideration.[78]

3.69 The Ernst & Young Report highlighted that these difficulties were not attributable to individual shortcomings on the part of certain personnel within the SIB, rather that criticism:

> Relating to the timeliness and quality of work has its root causes in process, structure and management rather than individuals' efforts and commitments.[79]

3.70 The independent investigation of significant complaints against SIB was also raised as 'an issue'.[80] The Report stated 'there is currently no oversight of the investigation of complaints against SIB, other than within Army's chain of command'.[81] The report noted, however, the capacity of the Inspector General Defence (IGD) and the IGADF to investigate certain types of complaints.[82]

3.71 A number of recommendations aimed at improving the capacity for the SIB to conduct its investigatory function were also made, and are discussed below. The overall tenor of the Ernst & Young report, however, describes an organisation in need of reform, and reiterates many of the committee's concerns with regard to the ADF's capacity to deliver impartial, rigorous and fair outcomes in the disciplinary context.

The Director of Military Prosecutions

3.72 In the course of his evidence to the committee on Monday 2 August, the Director of Military Prosecutions, Colonel Hevey, also expressed doubts concerning the capacity of Service police (particularly Army) to perform their function adequately. He informed the committee that, upon taking office as the DMP, he perceived a 'basic problem' in the training and policy development of military police.[83] He indicated that he had an informal level of involvement in the training of Naval

78 ibid., p. 6.

79 ibid., p. 5.

80 ibid., p. 49.

81 ibid.

82 ibid.

83 Colonel Gary Hevey, Director of Military Prosecutions, *Committee Hansard,* 2 August 2004, p. 51.

Investigative Service personnel, providing basic lectures on the structure of a record of interview.[84]

3.73 The DMP told the committee that upon taking office, he had assumed that investigators were adequately trained. He quickly found, however, that a lot of capability had been lost as a result of the disbandment of the special investigation branches. He suggested that investigators were perhaps not properly focussed on the things a prosecutor might require in order to conduct a matter adequately. A committee member suggested that an appropriately drawn record of interview is not a particularly unreasonable demand. Colonel Hevey agreed, but told the committee that twelve months ago, the military police could not provide adequate records of interview. He indicated that improvements in the last twelve months were largely due to the informal training provided by his office, but also noted that new training initiatives aimed at improving standards are to be developed, involving the Australian Federal police and other professional organisations.[85]

The policy/procedural framework—manuals and procedures

3.74 To obtain a more detailed and in-depth perspective on the policies and procedures governing the conduct of DFDA investigations, the committee requested the manuals, guidelines and Service instructions used by the Army, Navy and Air Force military police for the conduct of disciplinary investigations.[86] In the first instance, the committee was referred to the *Discipline Law Manual* (DLM). The DLM expressly provides 'Chapters 2 to 12 are a layman's guide to this law'.[87] True to this statement, the DLM contains a very scant and basic outline of the policies and processes governing DFDA investigations in Chapter Three. It does not contain any detailed guidance. Upon further request to the ADF, various documents were provided to the committee, including:

- Navy Investigative Service Quality Manual;
- 5th Military Police Company Special Investigation Branch Standing Orders;
- Military Police Technical Instruction Number 200 (Special Investigation Branch) Policy and Procedures; and
- Section 4 of the RAAF Police Manual (DI(AAF)AAP 4332.001).

3.75 These documents reveal a considerable degree of inconsistency between the three Services in the policies and procedures governing the conduct of disciplinary

84 ibid.

85 ibid., p. 52.

86 *Committee Hansard*, 10 August 2004, p. 8.

87 *Discipline Law Manual* ADFP 201 Volume 1, para. 1.18.

investigations. Significant discrepancy in the manuals with respect to the quantity and quality of detail and guidance provided in aspects of investigation techniques, evidence collection and brief composition is also noticeable.

3.76 Moreover, the committee notes that *Technical Instruction Number 200,* governing the conduct of the Army's Special Investigation Branch was written some 19 years ago, and was apparently last updated in 1990. The copy of the *Technical Instruction* provided to the committee has numerous incomplete and missing sections, incorrect and jumbled pagination, and missing pages. Notwithstanding this, it was formally provided to the committee as a document tendered to this inquiry.

3.77 The committee found several sections of the *Technical Instruction* highly offensive. These sections contain material and guidance reflecting outdated and prejudiced attitudes towards several sections of the community. This material should have no have a place in any modern organisation's operational manuals or guidelines. The committee has taken the view that the material need not be placed on the public record. The committee would like to emphasise, however, its concern at the grossly substandard state of Army's manual.

3.78 The ADF has indicated that this manual contains 'The extant instructions for the conduct of military police investigations' for the Army Special Investigations Branch.[88] The committee acknowledges that the *Technical Instruction* should be read in conjunction with the various other policy documents concerning Army's DFDA investigations, but is alarmed that these outdated 'extant instructions' still form part of the body of reference material from which Military police are expected to draw guidance for the conduct of investigations.

3.79 Despite the disarray evidenced in the Army's Investigation Manual, the committee notes that new Defence Investigation Technical Instructions (DITI) are currently under development. The new DITI are intended to consolidate the various single Service manuals and instructions for the conduct of Service criminal investigations and ensure that DFDA investigations are executed in accordance with Australian Government Investigation Standards and industry best practices. The ADF indicated that the DITI were intended for implementation in January 2005. This is a welcome and long-overdue development, but the committee is nonetheless concerned that, similar to other planned improvements to the investigations process, actual implementation of improvements encounters significant delay.

88 Department of Defence, Answers to Questions on Notice, 10 August 2004.

3.80 The Department of Defence was asked about the status of the new DITI during the June 2005 Estimates hearings, but was unable to provide any further information. The question was taken on notice.[89]

3.81 The committee notes that the current *Naval Investigative Service Quality Manual* and the excerpts from the Air Force Defence Instructions relating to investigations are much more coherent, ordered, comprehensive and up-to-date than Army's instructions. Whilst positive for Navy and Air Force, this nonetheless reveals the kind of stark inconsistencies between the three Services' attitudes, standards and practices.

3.82 Anecdotal evidence from victims of the system, evidence from personnel with decades of experience in the military police, and the ADF's own report all indicate fundamental shortcomings in the disciplinary investigations process. The committee received evidence outlining inordinate delay, secret investigations, inadequately trained investigators, lack of equipment, outdated manuals, low morale, inability to attract and retain high quality personnel, and overall inadequate resourcing—all occurring at a time when workloads are increasing and community respect for Service personnel and expectations regarding standards of fairness and accountability are rising. The committee believes that it is time to address seriously the flaws within the disciplinary investigations system.

Solutions offered in evidence

3.83 The committee received evidence outlining several current ADF initiatives intended to improve the conduct of disciplinary investigations, in addition to suggestions from other submitters. The committee has also considered overseas developments of relevance and interest to its terms of reference.

Suggestions from submissions to this inquiry

3.84 Lieutenant Commander Sankey offered a number of recommendations to improve the quality of disciplinary investigations.[90] He suggested that military police should participate in up-to-date military and civilian police training courses. This would enable investigators to maintain the capacity to investigate offences and manage investigations both in Australia and overseas. Another suggestion entailed the recruitment of reservists from the civilian police force. Lieutenant Commander Sankey suggested that this would solve the shortfall in experienced officers, increase the professionalism of MP investigators, and increase MP exposure to personnel who have considerable expertise and skills in civilian police practice and procedures.

---

89 Foreign Affairs, Defence and Trade Legislation Committee *Estimates Hansard* 31 May 2005, pp. 69–70.

90 Lieutenant Commander Brian Sankey, *Submission P4.*

Lieutenant Commander Sankey also suggested that there needs to be an element of 'cultural shift' within the Navy itself:

> In my opinion the effectiveness and efficiency of the NPC Category, and in particular the law enforcement aspects, are at an all time low…it is sadly a case of neglect with little interest in the professional development of the categories of officers…The military justice system can never be effective in Navy until management gives policing and law enforcement the prominence that it rightly deserves. The proficiency of the Naval Police Coxswain can only improve after senior Navy management realises the important requirement to have a consolidated, independent and professional investigative service.[91]

3.85 The SAS soldier also gave the committee some suggestions for improving the disciplinary investigations function. He suggested that a serious criminal investigations branch could be established, staffed with state police detectives acting as reservists on duty, and possessed of an efficient and professional permanent staff.[92]

3.86 The experiences and suggestions given in evidence from Lieutenant Commander Sankey and the SAS soldier reveal that the problems with disciplinary investigations are clearly not confined to any one Service—they are common to all three. As such, suggestions for reform should be made with a view to improving the ability of all three Service police forces to improve their capacity to conduct disciplinary investigations.

Recommendations from the IGADF-Commissioned report into the SAS Soldier's matter

3.87 The instrument of appointment for the inquiry into the treatment of the SAS soldier empowered the investigator to make recommendations arising out of the findings in his report. In the report, the investigator noted:

> My comment, and it is only a comment, is that Service Police are, by and large, not experienced in dealing with civil offences which are service offences by reason of DFDA, save for offences of dishonesty and basic assaults.[93]

3.88 To improve the capacity of Service police to perform their investigatory function, the *IGADF-Commissioned Report* suggested that a special criminal investigation branch should be established. Members of this branch should include

---

91 Lieutenant Commander Brian Sankey, *Submission P4.*

92 In Camera *Committee Hansard,* 1 March 2004, p. 2.

93 *IGADF-Commissioned Report: Part A,* p. 63.

specialist State police detectives serving as reserve members and highly efficient and professional permanent investigators.[94]

Suggestions from Michael Griffin's Issues Paper

3.89 Mr Griffin also made a number of suggestions concerning disciplinary investigation reform.[95] He stated:

> Few would argue with the idea that the ADF needs to maintain its own disciplinary system. However, that may not extend to operating an entire criminal system in duplication of the civilian environment. Practical considerations and harsh reality call into question the continued maintenance out of the public purse of a small and under-skilled criminal investigation service.[96]

3.90 Mr Griffin's suggested initiatives to improve disciplinary investigation outcomes include:

- outsourcing the investigative function (potentially to the Australian Federal police) 'to allow Service police to concentrate on their key military functions in support of the forces in the field';[97]
- in peacetime, referring all criminal activity to civilian counterparts, whilst maintaining close liaison;[98] and
- recruiting reservists from State police and the AFP.[99]

3.91 Mr Griffin suggested that outsourcing would free up resources for other ADF 'core business' activities, and relieve commanders of having to decide which crimes to deal with, allowing them simply to 'refer all suspected criminal activity to the civilian specialists located a few kilometres past the barracks gate'.[100]

---

94 ibid.

95 Mr Griffin was engaged by the committee in a consultative capacity to provide expert legal analysis of the evidence before this inquiry. He provided a paper, titled *Senate Inquiry into the Effectiveness of the Military Justice System,* to the committee. The paper is herein referred to as *Issues Paper*.

96 Michael Griffin, *Issues Paper,* para. 28.

97 ibid., p. 27.

98 ibid.

99 ibid.

100 ibid., para. 28.

Suggestions from the Ernst & Young Report

3.92 Following the analysis of the various shortcomings within the SIB, the Ernst & Young Report made a number of recommendations to improve the SIB's investigative capability. As a general statement, the Report argued:

> Army will need to give its investigation capability a new identity and image, appoint enlightened and expert investigation managers/leaders, move to professionalise its investigators, improve organisational effectiveness, recruit quality from across the ADF and attend to issues of well being if it is to maintain a sustainable capability.[101]

3.93 In terms of specific recommendations, the Report suggested:

- changes to command and organisational structure, essentially reconfiguring the SIB into an 'Army Investigation Service';
- a new case management system;
- the introduction of a personnel development programme;
- reduction of excessively bureaucratic administrative procedures;
- the establishment of Memorandums of Understanding (MOU) with state and federal civilian police for the provision of investigation, forensic, training and secondment services;
- MOUs with civilian services for the provision of quality assurance reviews;
- the establishment of key indicators against which performance can be monitored;
- the appointment of a legal officer to provide legal and quality assurance advice;
- the formal appointment of the IGADF to administer complaints against the proposed new 'Army Investigation Service';
- a review of Brief of Evidence procedures (preparation and circulation) and case and file management practices;
- equipment updates;
- various legislative amendments to facilitate the above changes, clarify powers of arrest, and allow specially qualified investigators to conduct investigations under the authority of Chief of Army;
- undertake a recruitment drive, and broaden the recruitment pool;

---

101 Ernst & Young, *Review of Military Police Battalion Investigation Capability,* p. 7.

- review and modernise training practices to bring military investigations in line with civilian standards; and
- increase training to all investigation personnel and introduce a coaching programme for junior/inexperienced investigators.[102]

3.94 The various recommendations contained in the submissions to this inquiry, Mr Griffin's issues paper and the Ernst & Young report, in addition to the suggestions made by witnesses, have all aided the committee greatly in its inquiry, and all warrant the attention and sustained consideration of the ADF. To inform its deliberations, the committee also considered Canada's experience.

The Canadian Military Police Complaints Commission

3.95 The Committee notes the statement in the Ernst & Young Report that the independent investigation of significant complaints against SIB was 'an issue',[103] and the report's recommendation that the IGADF be formally appointed to administer complaints. It notes further that Canada has an independent mechanism for handling and investigating complaints against Service police.

3.96 In response to a number of complaints and serious incidents involving the military police, the Canadian Government created the Military Police Complaints Commission in 1999 (MPCC). The MPCC was established as a quasi-judicial, independent civilian agency to examine complaints arising from either the conduct of military police members in the exercise of policing duties or functions, or from interference in or obstruction of their police investigations. All members of the MPCC are civilians, and are independent of the Department of National Defence and the Canadian Forces.[104]

3.97 The Lamer Report, which reviewed the legislation governing the MPCC, noted that the MPCC is an 'important oversight body responsible for ensuring that complaints as to military police conduct and interference with military police investigations are dealt with fairly and impartially'.[105] The Lamer report noted, however, 'the predicated scale of the workload of the Military Police Complaints Commission…seems to have been significantly overestimated'.[106]

---

102 ibid., pp. 59–68.

103 ibid., p. 49.

104 More information about the MPCC is available from http://www.mpcc-cppm.gc.ca/

105 The Rt Hon Justice Antonio Lamer *The First Independent Review of by the Right Honourable Antonio Lamer P.C., C.C., C.D., of the Provisions of Bill C-25,* An Act to Amend the National Defence Act and to make the Consequential Amendments to Other Acts *as required under Section 96 of Statutes of Canada 1988, c.35,* September 2003, p. 2.

106 ibid., p. 2.

ADF initiated change

3.98 The committee notes that the ADF has attempted to address a number of issues arising in the submissions and evidence provided to this inquiry.

Secret Investigations

3.99 General Cosgrove indicated that remedial action has been taken in an attempt to address the problems surrounding secret investigations:

> Chief of Army has indicated that this practice cease. Since early 2003 all personnel who are the subject of an investigation are informed of that fact through their chain of command at the commencement of the investigation.[107]

3.100 The committee notes the submission from Mr Geoff Lewis,[108] however, which provides detail concerning a secret investigation begun in early December 2003. This evidence casts doubt on whether Chief of Army's directive concerning the conduct of disciplinary investigations has been fully implemented.

Improving the Serious Crime Investigation capability

3.101 In his evidence to the committee, Mr Geoff Earley, IGADF, indicated that he is currently working with the ADF to enhance the serious crime investigation capability, possibly with the assistance of the civil police. The programme is at the early development stage:

> Further examination of how we might go about that is under development right now with the establishment of a working party and a project officer.[109]

3.102 The committee asked Mr Earley if a time line had been established for the implementation of this programme. Mr Earley indicated that there had not. 'In-principle' agreement had been reached concerning the need for a tri-Service investigative capability. However, the project team examining the practicalities of such an entity has only recently been established.[110]

3.103 The committee welcomes this initiative, but is concerned at the apparent lack of an implementation timeframe.

---

107 General Peter Cosgrove, Chief of Defence Force, *Submission P16,* p. 74.

108 Mr Geoff Lewis, *Submission P55.*

109 Mr Geoff Earley, Inspector General Australian Defence Force, *Committee Hansard,* 5 August 2004, pp. 87–8.

110 Mr Geoff Earley, Inspector General Australian Defence Force, *Committee Hansard,* 5 August 2004, pp. 87–8.

Response to the Ernst & Young Report

3.104 The committee acknowledges that Lieutenant General Leahy initiated the Ernst & Young Report to improve the quality of disciplinary investigations following a series of incidents, reports and inquiries that cast serious doubts about the competence of the military police.

3.105 In his correspondence enclosing the Ernst & Young Report, Lieutenant General Leahy indicated to the committee that a number of recommendations contained within the report require further development before being considered for implementation, but nonetheless expects 'that most recommendations will be accepted and implemented'.[111] Lieutenant General Leahy also informed the committee that a number of initiatives resulting from the Ernst & Young Report, aimed at enhancing individual investigators and improving the organisational environment, have already commenced.[112] He stated:

> I am confident that initiatives already in place have resulted in a better capability and, when combined with those that are currently being developed, will deliver a superior investigative capability in future years.[113]

Findings and recommendations

3.106 Having considered the evidence before it, the committee holds grave concerns about the ADF's capacity to conduct rigorous and fair disciplinary investigations. Somewhat reminiscent of the concerns voiced in the 2001 *Rough Justice* Report, this committee also considers that serious issues surround the competency of the military police to carry out their policing and investigatory function.

3.107 The committee notes that there are three types of offences that Service police may currently investigate:

- specific disciplinary offences;
- Service offences that have civilian criminal equivalents; and
- offences under the laws applicable in the Jervis Bay Territory.

3.108 The committee considers that the ADF has proven itself manifestly incapable of adequately performing its investigatory function. Whilst noting the recommendations advanced in the Ernst & Young report, and seeing great value in the ideas put forward, the committee does not think that the implementation of these recommendations go far enough. A decade of rolling inquiries has not met with the broad-based change required to provide adequate protection of the rights of Service

---

111 Lieutenant General Peter Leahy, Chief of Army, *Correspondence* dated 29 November 2004.

112 Lieutenant General Peter Leahy, Chief of Army, *Correspondence* dated 29 November 2004.

113 Lieutenant General Peter Leahy, Chief of Army, *Correspondence* dated 29 November 2004.

men and women. Each inquiry has led to the recurrence of the same problems and further disappointment. Attempts to change have proven ineffective.

3.109 The discipline process reaches its culmination in the trial of charges before a Service Tribunal. The Service police investigative function is critical to the effectiveness of the military justice system. As in the civilian environment, an efficient and effective police force is the cornerstone of a sound justice system. In many ways the present status of the Service police is a metaphor for the entire military justice system. The Burchett report and Lieutenant General Leahy's reference to Ernst and Young show that the organization is dysfunctional.

3.110 This committee has received submissions from Service police members which describe an organization in crisis. Members complain of poor morale, of being over-worked and under-resourced, of loss of confidence, lack of direction and a sense of confusion about their role and purpose. The Committee believes it is time to consider another approach to military justice.

3.111 Not long ago, the ADF and Army in particular, was a totally self supporting entity, capable of being deployed to foreign shores where it could and did support and administer itself. It had its own Survey Corps, its own Education Corps, its own Pay Corps and its own Catering Corps and performed numerous other logistic functions from its own personnel resources. There were many reasons for this not least of which were the tyranny of distance and the complete absence of alternatives sources of support.

3.112 However, the modern ADF and the battlefields and operational theatres are very different. Civilian management principles of ‘core business’ and ‘outsourcing’ have been widely applied across the military. Civilian contractors are everywhere, including Iraq, and have played a significant role in most of the recent ADF operational deployments. The committee believes the role of a criminal law system in the 'core business' is past, and it is appropriate to 'outsource' what is essentially a duplication of an existing civilian system.

3.113 Broad criminal investigative experience and deep knowledge of the law should be the hallmarks of any investigative service—civilian or military. Civilian police investigators, however, are generally better trained and more experienced in the conduct of criminal investigations than military personnel. Whilst knowledge of the military context is important, the attainment of rigorous and fair outcomes should be the primary aim of a competent system of military justice.

3.114 Outsourcing criminal investigations in peacetime would allow the Service police to concentrate on their key military functions in support of the forces in the field. The committee believes that in peace-time Australia they should refer all criminal activity to their civilian counterparts and focus their resources on training and developing their core business.

3.115 The AFP has had a conspicuous presence in many recent operational theatres. The high level forensic policing skills that the AFP possesses were evident to the

world in the aftermath of the Bali bombing and were also used to great effect in the investigation of atrocities in East Timor and the Solomon Islands. When overseas and on active service, these and other criminal law functions currently performed by Servicemen and women could readily be 'outsourced' to the AFP, whose entire business it is to conduct criminal investigations and prosecutions.

3.116 Few would argue that the ADF should not maintain its own disciplinary system, and the committee certainly does not. The military discipline system and the prosecuting of Service offences that undermine team morale and cohesion, such as desertion, is very important. Military personnel are best equipped to administer such a system. However, this view does not logically extend to the ADF operating an entire criminal system in duplication of the civilian environment. Practical considerations (including financial) and harsh reality (in particular, the underdeveloped criminal investigative skills and training of Service police compared with mainstream police), call into question the continued maintenance out of the public purse of a small and under-skilled criminal investigation service.

3.117 The question has to be asked: Why not keep the money and spend it on other ADF ‘core business’ requirements, relieve the commanders of having to decide which crimes they deal with and which they cannot and simply refer all suspected criminal activity to the civilian specialists?

3.118 The evidence before this committee reveals that a decade of rolling inquiries has not effected the kind of broad-based change required to improve the military police's investigative capacity. Despite constant scrutiny, the system is still plagued by delay and continually fails to equip personnel with the skills and experience necessary to conduct rigorous and fair investigations. Known problems have not been adequately addressed. The continual failure of the ADF to rectify recurrent problems leads the committee to the conclusion that the investigative function should be removed from the defence forces altogether and referred to the civilian experts.

Recommendation 1

3.119 The committee recommends that all suspected criminal activity in Australia be referred to the appropriate State/Territory civilian police for investigation and prosecution before the civilian courts.

3.120 The committee also considers that the investigative function performed by the military police whilst the defence forces are on operations overseas is also inadequate. The SAS soldier's case is highly illustrative of shortcomings in this regard. Again, civilian policing expertise is available and could easily be drawn on to enhance investigative capability. The committee therefore recommends that the ADF make better use of the AFP's expertise, and outsource the investigation of crimes committed whilst on operations overseas.

Recommendation 2

3.121 The committee recommends that the investigation of all suspected criminal activity committed outside Australia be conducted by the Australian Federal Police.

3.122 Service police should only conduct investigations in the first instance where the offence in question has no equivalent in the civilian community. The committee acknowledges, however, that there may be instances where the civilian authorities chose not to pursue a matter. Where this occurs, the committee considers that current arrangements for referral back to the military police should be retained.

3.123 Investigations involving civilian equivalent or Jervis Bay Territory crimes should therefore only be conducted by the Service police where civilian authorities elect not to pursue a matter. To maintain the current limitations on the capacity of the Defence Forces to investigate and prosecute individuals in the military justice system, matters should then only be pursued where proceedings under the DFDA can reasonably be regarded as substantially serving the purpose of maintaining or enforcing Service discipline.

Recommendation 3

3.124 The committee recommends that Service police should only investigate a suspected offence in the first instance where there is no equivalent offence in the civilian criminal law.

Recommendation 4

3.125 The committee recommends that, where the civilian police do not pursue a matter, current arrangements for referral back to the service police should be retained. The service police should only pursue a matter where proceedings under the DFDA can reasonably be regarded as substantially serving the purpose of maintaining or enforcing service discipline.

3.126 Referring matters to the civilian authorities in the first instance will improve military justice outcomes. The committee considers, however, that the training, expertise and competence of Service Police still needs to be addressed. Where matters are not pursued by civilian authorities and referred back to the military police, the capacity for military police to adequately investigate must be improved. A Service member's right to a rigorous and thorough investigation should not be dependent on a lottery of fluctuating civil police workloads and military police capabilities.

3.127 The committee notes that the Service police's capacity to perform its investigative function is in dire need of improvement. The committee endorses the recommendations contained in the Ernst & Young report for the improvement of the Service police's investigative function, and encourages engagement with civilian agencies, including secondments, reserve recruitment, and participation in civilian investigative training.

3.128 Regardless of whether criminal investigations are conducted by civilian or military police, the fact remains that they should be conducted competently. Several submissions have supported the proposition that the Defence force needs people working within the military justice system who have a sound knowledge and understanding of the institutional context in which the discipline system operates. Recruiting civilian police into the military through a reserve scheme, and exposing Service police to civilian police training through secondments will increase the skills base and expertise of the Military police investigation services. It would simultaneously allow for an appreciation of the institutional context within which the alleged crime has been committed.

3.129 The committee considers that reserve civilian police should assume a more important role in the investigation of discipline offences and offences that are referred back from civilian authorities. Reserves should be utilised to maintain and enhance the current skills base. Exposing permanent Service police to the expertise of civilian reservists will also improve the investigative function. The ADF should undertake an active reserve recruitment campaign to attract personnel from the federal and state police forces.

Recommendation 5

3.130 The committee recommends that the ADF increase the capacity of the Service police to perform their investigative function by:

- **fully implementing the recommendations contained in the Ernst & Young Report;**
- **encouraging military personnel secondments and exchanges with civilian police authorities;**
- **undertaking a reserve recruitment drive to attract civilian police into the Defence Forces;**
- **increasing participation in civilian investigative training courses; and**
- **designing clearer career paths and development goals for military police personnel**

3.131 Several submissions also suggested the creation of a tri-service serious crimes investigative capability. The committee also notes that the Canadian Forces have a 'National Investigation Service' that provides specialized and professional investigative services to the defence forces on a national and international basis. It has been suggested that the creation of a similar service for the ADF would allow the development of investigative expertise, streamline processes, utilise resources more efficiently, and would create a more appealing and identifiable career path for recruits.

3.132 The committee considers that this proposal warrants the attention of the ADF, and should be examined in detail. It would need to be preceded by a tri-service audit to determine current and future staffing, equipment, training and resourcing requirements. The committee further considers that the Ernst & Young Report, although confined to an examination of the Army's investigation capability, would

provide a good template upon which to base a subsequent examination of the ADF's investigative capability across the three services.

Recommendation 6

3.133 The committee recommends that the ADF conduct a tri-service audit of current military police staffing, equipment, training and resources to determine the current capacity of the criminal investigations services. This audit should be conducted in conjunction with a scoping exercise to examine the benefit of creating a tri-service criminal investigation unit.

3.134 The committee acknowledges that recommending the removal of all civilian criminal equivalent and Jervis Bay Territory offences will have fundamental implications for the discipline system. It will now discuss the evidence concerning the provision of legal advice for decisions to initiate prosecutions and the defence of accused service members, and make flow-on recommendations.

Chapter 4

Decisions to initiate prosecutions and the provision of legal services

4.1 This chapter examines issues surrounding decisions to initiate prosecutions, the provision of legal advice for the initiation and conduct of prosecutions, and the availability of legal services for members charged with offences under the DFDA. It also considers the impact of the Director of Military Prosecutions on the administration of criminal and disciplinary processes.

Decisions to Prosecute

4.2 Decisions to conduct prosecutions are based on DI(G) PERS 45-4 *Australian Defence Force Prosecution Policy*. According to DI(G) PERS 45-4, prosecuting charges under the DFDA is an important means of maintaining discipline in the ADF. Further:

> The initial decision whether or not to prosecute is the most important step in the prosecution process. A wrong decision to prosecute, and conversely a wrong decision not to prosecute, tends to undermine confidence in the military discipline system.[1]

4.3 DI(G) PERS 45-4 provides that decisions to initiate and continue prosecutions under the DFDA rest with commanding officers.[2] It also outlines the factors that should govern a commander's decision to prosecute. The 'fundamental question' for any commander is whether the prosecution serves the public interest (defined primarily as the maintenance of Service discipline).[3] In reaching this decision, commanders must consider:

- whether the admissible evidence available is capable of establishing the offence;
- whether there is a reasonable prospect of achieving a conviction; and
- other discretionary factors, such as consistency and fairness, operational requirements, deterrence, seriousness of the offence, interests of the victim, nature of the offender, prior conduct, degree of culpability, effect upon morale and delay in dealing with matters.[4]

4.4 When a Service member is charged, commanding officers or subordinate summary authorities (appointed by commanding officers) decide whether to proceed

---

1 DI(G) PERS 45–4, para. 2. See also ADFP201 Volume 1, *Discipline Law Manual*, para. 4.2.

2 DI(G) PERS 45–4, para. 1.

3 DI(G) PERS 45–4, para. 8.

4 DI(G) PERS 45–4.

with the matter. Commanding officers also decide the way in which the matter will be conducted (the form of the tribunal, etc). As such, under current arrangements, decisions to initiate and proceed with prosecutions are located squarely and wholly within the chain of command.

Flawed decisions to prosecute

4.5 The committee has received evidence of two disturbing instances evidencing significantly flawed decisions to prosecute. These two cases highlight problematic aspects of prosecutorial decision-making processes.

4.6 In the SAS soldier's case, flowing on from the investigative shortcomings discussed in Chapter 3, the decision to prosecute was similarly defective. Evidence before the committee reveals the decision to prosecute was based on unsworn, untested, unreliable, non-corroborating inculpatory 'evidence', compiled long after the event, from witnesses that would not and could not testify at the soldier's trial. This was coupled with a concomitant failure to consider the significant body of exculpatory evidence when deciding to prosecute.[5]

4.7 Evidence to the committee overwhelmingly supports the conclusion that adequate steps were not taken to ensure that the initial decision to prosecute complied with the ADF's prosecution policy.[6] Moreover, when it became apparent to the prosecutor that a prosecution could not succeed, the policy was again contravened by its continuation, regardless of the high likelihood of failure.[7]

4.8 The committee is also aware that the full Federal Court found the decision to initiate a prosecution against Mr Michael Hoffman, a Major in the Australian army, was flawed.[8] In this instance, charges were laid seven years after the alleged incident, in a manner designed to avoid time limitations imposed under the DFDA barring the prosecution. The court found that the attempt to charge Mr Hoffman in this manner was invalid—the decision to prosecute should not have been made. Mr Griffin, commenting on this case, states:

> The costs to the public purse of the lengthy investigation and protracted prosecution and the multiple appeals to the Defence Force Discipline Appeals Tribunal (DFDAT) and Federal Court are substantial.[9]

---

5 Confidential *Submission C4; Committee Hansard,* 1 March 2004; and *IGADF—Commissioned Report.*

6 Confidential *Submission C4;* General Peter Cosgrove, Chief of Defence Force, *Submission P16,* p. 79.

7 *IGADF—Commissioned Report.*

8 *Hoffman v Chief of Army* [2004] FCAFC 148.

9 Michael Griffin*, Issues Paper* para. 21.

4.9 As well as the financial costs flowing from the flawed decision to prosecute, the inordinate length of time taken to resolve the matter and the pressures associated with legal proceedings imposed extraordinary hardship on Mr Hoffman and his family.

> Our family's psychological and emotional abuse suffered at the hands of the military justice system has been likened to repeated bashings with a baseball bat perpetuated by multiple unknown assailants on multiple occasions—never sure if it was the last bashing…Our journey is a horrific example of the appalling state of the military justice system, highlighting organisational deficiencies, the system barriers, the lack and/or failure to adhere to the relevant policies, processes or procedures. A complete abuse of process that began in 1998 and continued for seven years—a system in total disarray.[10]

4.10 Both these cases have had high public profiles and attracted considerable media attention. Again, the committee wonders how many other ADF members have endured a similar ordeal.

4.11 It is important to note that, when the initial decision to prosecute was made in both these instances, the Office of the Director of Military Prosecutions did not exist and therefore advice of the Director of Military Prosecutions was not sought.

Findings of previous inquiries

4.12 Previous inquiries have also highlighted problems with the disciplinary decision-making process, particularly the appropriateness of the CO's role as 'decision maker'. The 1995 Abadee report discussed the CO's multiple and potentially conflicting roles:

> There is a particular view, indeed almost a consensus view, that provisions of the DFDA in allocating multiple roles to the CA [Convening Authority], including the initiation of prosecution, and review of CM [Courts Martial] (and DFM) proceedings, do raise legitimate concerns as to the appearance of fairness and impartiality of such trials, despite the specific precautions to protect against the improper or unlawful use of command influence and the wide range of procedural rights to guard against command influence…There is an acceptance that the system may be perceived to place the CA…in the position of determining whether there be a trial, the nature of the tribunal and charges, and selecting the trial judge, 'jury' and prosecutor, as well as reviewing the proceedings.[11]

4.13 To avoid the difficulties presented by the multiple roles of the CO/convening authority, Justice Abadee recommended establishing an independent tri-Service Director of Military Prosecutions (DMP). The proposed DMP would assume a decision-making role similar to the Commonwealth, State or Territory Directors of

---

10 Confidential *Submission C10,* p. 10. Quoted with the permission of Mr and Mrs Hoffman.

11 *Abadee Report*, pp. 151–2.

Public Prosecutions, thereby removing decisions to prosecute from commanding officers. Justice Abadee argued there was a 'substantial case' in favour of doing this, claiming it would:

> help to ensure a high degree of independence in the vital task of making prosecution decisions (including during a trial) and exercising prosecution discretions, and objectively assist in avoiding suspicions that prosecutorial discretions will be exercised save upon entirely 'neutral grounds'.[12]

4.14 In its 1999 *Military Justice* Report, the JSCFADT discussed the arguments for and against establishing the office of DMP. The joint committee expressed the view that a DMP would add to the perception of independence, provide consistency and assist to ensure that, as far as possible, the prosecution component of the trial process was impartial.[13] The 2001 Burchett report also concluded that a DMP would be beneficial:

> I have reached the view that, on balance, there is more to be gained from the early introduction of an independent DMP than from postponing the decision any further. In my opinion it would not only enhance the perception and reality of fairness in the system but, as the Judge Advocate General has observed, would also provide a more professional, unified and consistent approach to prosecution decisions.[14]

4.15 All reports commented on the experiences of other jurisdictions—most notably Canada and the UK. Both these countries had introduced independent DMPs to avoid perceptions of unfairness, and protect Service personnel's right to a fair and independent trial.

An independent Australian Director of Military Prosecutions?

4.16 In its March 2002 response to the JSCFADT's *Rough Justice* report, and following repeated recommendations contained in other reports and the success of developments overseas, the Government indicated that it would establish an independent Office of the Director of Military Prosecutions (ODMP).[15] The *Government Response* stated that legislation to amend the DFDA would be proposed once the Chiefs of Staff Committee (COSC) had considered the DMP's appointment process and functions.[16] Agreement on the establishment of an independent statutory DMP was reached on 19 February 2003.[17]

---

12 ibid., p. 154.

13 JSCFADT 1999 Report, p. 135.

14 *Burchett Report,* p. 137.

15 *Government Response to ROUGH JUSTICE? An Investigation into Allegations of Brutality in the Army's Parachute Battalion,* March 2002, p. 3.

16 ibid., p. 3.

17 General Peter Cosgrove, Chief of Defence Force *Committee Hansard,* 1 March 2004, p. 12.

4.17 The committee has been asked to examine the impact of the proposed ODMP.[18] This encompasses an analysis of the institutional framework creating the ODMP, in addition to an evaluation of the practical operation of the office's activities.

The framework

4.18 Following COSC agreement on the structure and function of the ODMP, on 15 August 2003, DI(G) PERS 45-6 *Director of Military Prosecutions—Interim Implementation Arrangements* was issued. It states:

> The establishment of the DMP is designed to enhance the independence and impartiality of the military prosecution process under the DFDA. The DMP will be an independent statutorily-appointed position separate to the chain of command.[19]

4.19 Under the auspices of DI(G) PERS 45-6, the DMP:

- provides pre-trial advice to convening authorities;
- conducts prosecutions at courts martial and DFM trials;
- provides legal advice to commanding officers to assist them in determining whether to charge an individual under the DFDA; and
- represents the ADF at appellate tribunals and courts.[20]

4.20 Amendments to the DFDA are required to establish formally the statutorily independent DMP position. Under the current interim arrangements, the DMP is appointed through, and remains subject to, the chain of command. Decisions to initiate prosecutions therefore remain with commanding officers. The DMP acts purely in an advisory capacity—commanding officers are free to accept or reject any advice given.[21]

4.21 In a media release dated 30 June 2003, The Hon Danna Vale, Minister Assisting the Minister for Defence, stated:

> I have directed Defence to expedite the development of the necessary legislation required to establish this position as a statutory appointment providing independent prosecutorial decision-making similar to that of Commonwealth, State and Territory Directors of Public Prosecution.[22]

---

18 Foreign Affairs, Defence and Trade References Committee, *Inquiry into the Effectiveness of Australia's Military Justice System,* Reference Term (3).

19 DI(G) PERS 45-6, para. 2.

20 DI(G) PERS 45-6, para. 6.

21 Colonel Gary Hevey, Director of Military Prosecutions, *Committee Hansard,* 2 August 2004, p. 56.

22 The Hon Danna Vale MP, 'Media Release', 30 June 2003.

4.22 In his submission to this inquiry, General Cosgrove indicated that legislation formally establishing the appointment was anticipated for introduction in 2004.[23] During evidence to the committee in March of 2004, the Director-General of the Defence Legal Service (DGTDLS), Air Commodore Harvey, also indicated that implementing legislation was 'imminent'.[24]

4.23 The current DMP, Colonel Gary Hevey, appeared before the committee on 2 August 2004. He gave a compelling account of the need to introduce enabling legislation, the difficulties with current structural arrangements, and his frustration with the Government's inaction. Colonel Hevey informed the committee that the matter had been referred to the Attorney-General's Department, a drafter had been appointed, but the first draft of the legislation has not yet been forwarded to him for comment. He claimed:

> I am caught between a rock and a hard place, where people demand statutory independence of me and do not give it to me.[25]

4.24 He emphasised that the legislation was absolutely necessary to remove his position from the chain of command and guarantee the independence of his office:

> I have just sat in the other room and watched the discussion concerning independence and how people can be said to be independent. The claim can be made of me: don't you have to report to the Chief of the Defence Force? The answer is, 'Yes, I do.' Why? Because he is my boss. Then the next question comes: 'When you chose to prosecute or not to prosecute Private Bloggs, General Smith, Admiral Jones or whoever it may be, were you influenced in that decision?' Until I am removed from the chain of command by the office being established properly, I cannot be independent. I must be a person who is within a chain of command somewhere. So, no, the position is not statutorily independent. Would I like it to be? Yes, please. How quickly? As quickly as you can possibly do it.[26]

4.25 A committee member asked Colonel Hevey if the delay might be due to the complexity of the legislation. Colonel Hevey told the committee that a bill could be easily modelled on current statutes creating the various Commonwealth, State and Territory Directors of Public Prosecutions, adding 'this is not a massive task'.[27]

---

23 General Peter Cosgrove, Chief of the Defence Force, *Submission P16*, p.18.

24 Air Commodore Simon Harvey, Director General Defence Legal Service, *Committee Hansard,* 1 March 2004, p. 55.

25 Colonel Gary Hevey, Director of Military Prosecutions, *Committee Hansard*, 2 August 2004, p. 47.

26 Colonel Gary Hevey, Director of Military Prosecutions, *Committee Hansard*, 2 August 2004, pp. 46–47.

27 Colonel Gary Hevey, Director of Military Prosecutions, *Committee Hansard*, 2 August 2004, p. 57.

4.26 Colonel Hevey commented that, if and when the ODMP becomes statutorily independent, it will take over the decision-making function of some 33 one and two star officers in the military justice system. As was outlined above, the DMP currently acts in an advisory capacity. Decisions to initiate prosecutions still remain with commanding officers. The committee notes if legislation is passed establishing the ODMP, the decision-making function will be centralised. The control the DMP will then have over the decision-making function will go a considerable way towards improving the consistency of decision-making, and will reduce the likelihood that prosecutorial aberrations will occur in the future. Indeed, in his evidence to the committee, the SAS soldier stated:

> The initiative of raising a Director of Military Prosecutions is a very positive step which will ensure that investigations and the briefs of evidence which are provided at the end of an investigation will be of the proper standard and should go a long way to stop unsustainable cases from going to DFDA action.[28]

4.27 The committee holds the opinion that a statutorily independent DMP is a vital element of an impartial, rigorous and fair military justice system. It finds the Government's inaction unsatisfactory. Until such time as the promised legislation is passed, decisions to initiate prosecutions are not seen to be impartial, the DMP is not independent, and fundamentally, the discipline system cannot be said to provide impartial, rigorous and fair outcomes.

4.28 The Minister for Defence, Senator Robert Hill, was asked during the May 2005 Budget Estimates hearings whether the Government had drafted the necessary legislation creating the statutorily independent office of the DMP. Senator Hill acknowledged that it had taken "a very long time to get to this point", but indicated that legislation would be finally introduced into the Parliament during June 2005.[29]

Assessment of current operation per TOR (3)

4.29 Aside from examining the structural arrangements for the ODMP, the committee has also examined its practical operation during the interim phase.

Case management and workload

4.30 In his evidence to the committee, Colonel Hevey indicated that the workload of the newly-established ODMP far exceeded original expectations. The Office's caseload was projected to total between 120 and 150 matters per year, with between 50 and 80 cases going to trial. In its first year of operation, however, the ODMP has dealt with in excess of 260 matters.[30] Furthermore:

---

28 In Camera *Committee Hansard,* 1 March 2004, p. 5.

29 FADT Legislation Committee *Estimates Hansard* 31 May 2005, p. 70.

30 Colonel Gary Hevey, Director of Military Prosecutions, *Committee Hansard,* 2 August 2003, p. 49.

> We are moving out of the advice stage into the advocacy stage; in other words, a lot of those matters that we have advised on are now heading to trial work. That will put further pressure on us because we will not have people in the office to do the advising because they will be doing their advocacy work.[31]

4.31 Workloads will also become heavier as awareness of the ODMP increases. Colonel Hevey indicated that a significant portion of his time over the past year has been devoted to elevating the profile of the Office within the Defence Forces. Despite a fairly high profile within Army (Colonel Hevey's own Service), the office remains 'relatively unknown' to many people in the Navy and Air Force. [32] It can be expected that as the level of awareness rises in Air Force and Navy, there will be a concomitant rise in the number of cases referred.

4.32 An analysis of the operation of the ODMP reveals that there are significant differences between projected and actual caseloads. The volume of work is already double that originally anticipated, placing considerable pressure on office personnel. This situation is unlikely to improve if the profile of the office is elevated within the ADF, if matters currently 'on the books' move from the advice stage into advocacy, and if staffing remains at current levels. A service and resource review is required in order to ensure that as the volume of work increases, client requirements are met.

Personnel—permanent legal and administrative staff

4.33 The ODMP was established on 1 July 2003 and is located in Sydney. It has a staff of ten personnel, comprising the Director, Deputy Director, six prosecutors, a Service police investigator and a paralegal. The Deputy Director and the prosecutors are Permanent Legal Officers (PLO's) drawn from all three Services. The paralegal is an APS employee from the Department of Defence. The ODMP also has access to over 300 legal reservists located around Australia.[33]

4.34 Prior to joining the ODMP, PLOs undertake a unit of discipline law as part of a Masters degree in Military Law. Upon assignment to the Office, PLOs are initially posted to state offices of police prosecutions for between six and twelve months. They then move to a three-month secondment with the NSW Office of Public Prosecutions. These external postings are designed to develop the practical skills required for effective legal advocacy.

4.35 PLOs are not required to hold practising certificates, but have been admitted to practise as a barrister or solicitor in the Supreme Court of the State where they were

---

31 Colonel Gary Hevey, Director of Military Prosecutions, *Committee Hansard,* 1 March 2004, p. 56.

32 Colonel Gary Hevey, Director of Military Prosecutions, *Committee Hansard,* 1 March 2004, p. 48.

33 Colonel Gary Hevey, Director of Military Prosecutions, *Committee Hansard,* 1 March 2003, p. 63.

admitted.[34] The committee is aware a recent decision in the ACT Supreme Court, *Vance v Chief of Air Force,*[35] raised questions about the perceived independence and impartiality of PLOs arising from the fact that they are not required to hold practising certificates, regardless of whether or not they have been admitted to practise. The committee considers that to enhance their independence, PLOs should be required to hold practising certificates for ethical and professional conduct reasons. Further discussion concerning the independence and impartiality of PLOs is given below at para 4.58.

4.36 PLOs undertake a four week advanced course in military discipline law. The DMP and Deputy DMP also provide a degree of 'in house' training. The DMP considers that his staff would benefit greatly from longer secondments with civilian prosecuting authorities. Given the increasing workload, however, the ODMP has insufficient resources available to allow lengthy absences, despite the beneficial effects this would have.[36]

4.37 The committee considers that the training and development requirements of ODMP personnel need to be addressed. Exposure to civilian processes and the practical skills garnered during secondments with civilian prosecuting authorities are vital to improving the quality of legal services provided by PLOs and will broaden the skills base within the Office.

Personnel— the Director of Military Prosecutions

4.38 The DMP is a Reserve Legal Officer, not a permanent member of the ADF. According to Colonel Hevey, the occupant of the position requires considerable civilian and military legal experience.[37] Evidence to the committee suggests that the DMP's reserve status is highly desirable, as sufficient civilian experience cannot generally be readily acquired by permanent ADF legal officers.

4.39 The DMP's role was originally envisioned as that of an 'overseer'. It was expected that he or she would attend the office for one week per month. The work involved in establishing the office has, however, meant that the current DMP, Colonel Hevey, has spent far more time in the Sydney office and travelling around Australia

---

34 Air Commodore Simon Harvey, Director General The Defence Legal Service, *Committee Hansard* , 6 August 2004, p. 12.

35 *Russell Vance v Air Marshall Errol John McCormack in his capacity as Chief of Air Force and the Commonwealth* [2004] ACTSC 78 (2 September 2004).

36 Colonel Gary Hevey, Director of Military Prosecutions, *Committee Hansard,* 1 March 2003, p. 63.

37 Colonel Gary Hevey, Director of Military Prosecutions, *Committee Hansard,* 2 August 2003, p. 47.

than anticipated.[38] He indicated to the committee that over the twelve months to August 2004, he spent more than half his working year acting in his capacity as DMP:

> My last 15 months have required in excess of 140 days, which is, frankly, an enormous commitment. Over the last 12 months it has been in excess of 110 days. If we take a normal working year, it rounds out at about 200 working days per year after normal adjustments for weekends, leave et cetera. More than half my year has been devoted to trying to get this office up and running. That has meant that I have spent a lot of time in the office in Sydney, which is where we are currently located—about 40 days all told there. But there has been a lot of time spent either here in Canberra or around the traps, telling people that this office is up and running and introducing myself…there has been an establishment phase. It has been a demanding phase because, as well as the establishment, we have obviously had the committee and have had to attend to its requirements. We have had a Defence Force Discipline Appeal Tribunal hearing and we have had a matter before the High Court, so we have had a very demanding year. For the last financial year, my time in the service, as it were, is in excess of 110 days. So more than half of my working year has been spent doing this particular job.

4.40 The DMP position is established at the rank of Colonel. The rank of the position presents two problems. First, difficulty stems from a Colonel taking over the prosecutorial decision-making function of officers considerably higher up than he or she in the chain of command (one and two star General-equivalent officers). Second, the level of remuneration for a reserve legal officer with the rank of Colonel is approximately $275 per day.[39] This is considerably below the rate that a reserve legal officer with the experience and qualifications required of the DMP could expect to receive in private practice.

4.41 This disparity between remuneration rates may operate as a barrier to attracting high quality personnel in the longer term. The current DMP indicated to the committee that he considers the work to be a 'labour of love' and does it 'because I am silly enough to think it is worthwhile'.[40] If the DMP's remuneration rate is not pegged at a level more commensurate with private rates, it cannot always be assumed that the position will attract personnel as experienced, committed and altruistic as Colonel Hevey.

4.42 The committee is mindful of the constraints faced by the ODMP. It is concerned about the training provided to staff and the level of resources assigned to the office in the face of rising workloads. Despite these concerns, the committee is

---

38 Colonel Gary Hevey, Director of Military Prosecutions, *Committee Hansard,* 1 March 2003, p. 48.

39 Colonel Gary Hevey, Director of Military Prosecutions, *Committee Hansard,* 2 August 2004, p. 62. The occupant also is not entitled to leave or superannuation.

40 Colonel Gary Hevey, Director of Military Prosecutions, *Committee Hansard,* 1 March 2003, p. 62.

nonetheless very impressed with the work of the ODMP to date. It considers that despite the difficulties mentioned, the DMP is doing an admirable job. The committee has no doubt that, if given adequate resources, a statutory mandate, and more time to develop its operational capability, the ODMP will continue to provide an invaluable service to the ADF.

Findings and Recommendations

4.43 The committee holds the view that decisions to initiate prosecutions for civilian equivalent and Jervis Bay Territory crimes should be referred in the first instance to civilian prosecuting authorities. The DMP should only exercise a decision-making function where there is no civilian equivalent crime, or where matters have been referred back from the civilian authorities.

Recommendation 7

4.44 The committee recommends that all decisions to initiate prosecutions for civilian equivalent and Jervis Bay Territory offences should be referred to civilian prosecuting authorities.

Recommendation 8

4.45 The committee recommends that the Director of Military Prosecutions should only initiate a prosecution in the first instance where there is no equivalent or relevant offence in the civilian criminal law. Where a case is referred to the Director of Military Prosecutions, an explanatory statement should be provided explaining the disciplinary purpose served by pursuing the charge.

Recommendation 9

4.46 The committee recommends that the Director of Military Prosecutions should only initiate prosecutions for other offences where the civilian prosecuting authorities do not pursue a matter. The Director of Military Prosecutions should only pursue a matter where proceedings under the DFDA can reasonably be regarded as substantially serving the purpose of maintaining or enforcing Service discipline.

Recommendation 10

4.47 The committee recommends that the Government legislate as soon as possible to create the statutorily independent Office of Director of Military Prosecutions.

Recommendation 11

4.48 The committee recommends that the ADF conduct a review of the resources assigned to the Office of the Director of Military Prosecutions to ensure it can fulfil its advice and advocacy functions and activities.

Recommendation 12

4.49 The committee recommends that the ADF review the training requirements for the Permanent Legal Officers assigned to the Office of the Director of Military Prosecutions, emphasising adequate exposure to civilian courtroom forensic experience.

Recommendation 13

4.50 The committee recommends that the ADF act to raise awareness and the profile of the Office of the Director of Military Prosecutions within Army, Navy and Air Force.

Recommendation 14

4.51 The committee recommends that the Director of Military Prosecutions be appointed at one star rank.

Recommendation 15

4.52 The committee recommends the remuneration of the Director of Military Prosecutions be adjusted to be commensurate with the professional experience required and prosecutorial function exercised by the office-holder.

Defence Counsel Services

4.53 In addition to the legal advice provided to Commanding Officers for the prosecution of Service offences, the committee has also considered the legal advice available to Service personnel accused of committing Service offences.

4.54 Currently, legal advice at Commonwealth expense is available to members who are being investigated or charged with an offence under the DFDA.[41] The committee notes, however, that there are conditions attached to securing assistance.

4.55 The DLM provides that, in summary hearings, an accused has the right to conduct his or her own defence or request the services of a member of the Defence Force to defend him or her. Where the services of the requested person are reasonably available, the person must be permitted to defend the accused. The manual expressly states, however:

> There is no right to be represented by a legal officer unless a commanding officer or a superior summary authority permits a legal officer to act as the defending officer.[42]

4.56 At the summary level, the right to be *represented* by a Legal Officer is therefore contingent upon the permission of the Commanding Officer. At courts

41 General Peter Cosgrove, Chief of Defence Force, *Submission P16*, p. 14.

42 *Discipline Law Manual ADFP 201, Vol 1,* para. 7.45.

martial and DFM trials, an accused person may be represented by any member of the Defence Force or by any legal practitioner. Pre-trial advice is available free of cost from a permanent or reserve legal officer.[43]

4.57 When Service members are in custody for an offence, they should be advised that they may speak with a legal practitioner of their choice. Members are then given a list of legal officers. The JAG appoints legal officers on the list. All ADF legal officers are admitted to practise as a barrister or solicitor of the Supreme Court of the state where they were admitted to practice. Reserve Legal Officers (RLOs) hold practising certificates and are bound by the rules of ethics and professional conduct governing the law societies (or equivalent) of which they are members. Permanent Legal Officers (PLOs), however, are not required to hold practising certificates and are therefore not bound by the same rules of ethics and professional conduct as their Reserve colleagues.[44]

4.58 Concerns have been raised with the committee that the absence of a requirement that PLOs hold practicing certificates may impact upon perceived or real impartiality and independence. The committee has already noted that the recent ACT Supreme Court decision *Vance v Chief of Air Force* raises questions about the status of PLOs due to this systemic failing (see para. 4.35).

4.59 The committee is concerned that PLOs may not have a sufficient degree of perceived or real impartiality and independence. The committee has already noted that the recent ACT Supreme Court decision *Vance v Chief of Air Force* cast considerable doubt on the status of PLOs[45] (see para. 4.35).

4.60 In the *Vance* decision, Justice Crispin determined that PLOs lack perceived independence, basing his decision on the absence of practising certificates. He observed that PLOs were not bound by the same rules of professional conduct or codes of ethics as lawyers holding practising certificates, and also are not required to undertake continuing legal education. He stated:

> The law is substantially dependent upon trust in the competence and integrity of legal practitioners to obviate or at least reduce that risk [of spurious claims to lawyer-client privilege]. That trust is not based solely upon the possession of academic qualifications in law or admission as legal practitioners. It is based largely upon continued good standing in a profession that takes active steps to ensure the maintenance of appropriate ethical and professional standards. It does so by fostering awareness of its traditions of integrity and service, by the influence of peers, by the need for practitioners to demonstrate continuing compliance with ethical and

43 ibid. para. 8.57.

44 Air Commodore Simon Harvey, Director-General Defence Legal Service, and Colonel Ian Westwood, Chief Judge Advocate *Committee Hansard,* 6 August 2004, p. 12.

45 *Russell Vance v Air Marshall Errol John McCormack in his capacity as Chief of Air Force and the Commonwealth* [2004] ACTSC 78 (2 September 2004).

> professional standards and in most jurisdictions participation in continuing legal education in order to maintain practising certificates.
>
> In contrast, as Commodore Smith [DGTDLS at the time of this trial] conceded, DLOs are not required to keep abreast of relevant changes in the rules of practice or legal ethics.[46]

4.61 Justice Crispin observed that PLOs could be lawfully ordered to act in a manner contrary to the standards set in codes of ethics and professional conduct. He also noted that a culture existed in the Defence Forces 'within which there may be scant recognition of the need for independence'.[47] He observed that the two legal officers in *Vance* case:

> Had been so influenced by the cultural milieu within which they worked that they were effectively unable to make an independent judgement based on legal and ethical duties that should have been accepted without question by any legal practitioner.[48]

4.62 Justice Crispin made particular reference to the position of PLOs appointed to defend Service personnel charged with disciplinary offences. He stated there was evidence in this particular case that the legal officers seemed unable to understand the need to act independently. In his judgement he identified an incontrovertible conflict between the duty the PLO owed to the defendant, and his or her position as a member of the ADF:

> Any lawyer representing a person at any hearing, let alone a criminal trial, must obviously regard that person as his or her client … and as Street CJ said in Law Society of New South Wales v Harvey [1976] 2 NSWLR 154, at 170, there can be no doubt that 'the duty of a solicitor to his client is paramount, and that he must not prefer his or the interest of another to that of his client'. The mere fact that he or she has been employed or retained by some other person or body to represent the client does not in any way relieve him or her of that duty. Hence, a lawyer engaged by a legal aid body to represent an accused person would clearly breach his or her duty by accepting any instruction not to take any steps in the client's interests that might embarrass or otherwise adversely affect that body's interests.
>
> It is true that lawyers should generally seek to avoid such conflicts of interest and that, if the interests of the client and instructing solicitors conflict, counsel should normally advise the solicitors that they should decline to accept further instructions in the matter and refer the client to independent solicitors. However, the terms of s 137 of the Discipline Act and the relevant portion of the Australian Defence Force Administrative Inquiries Manual clearly contemplate the allocation of DLOs to represent members of the ADF in circumstances in which such conflicts are likely to arise. **In this context it is difficult, if not impossible, to see how the ADF**

---

46 *Vance v Chief of Air Force,* paras 42–43.

47 *Vance v Chief of Air Force,* para. 83.

48 *Vance v Chief of Air Force,* para. 70.

> **could comply with the requirements of the Act and/or Manual without placing DLOs in a position in which they were forced to choose between adhering to their duty to the client and infringing the direction [not to provide advice that may be contrary to the Commonwealth's interests].**
>
> It is also true that, viewed over all, the interests of the Commonwealth may be served by allocating DLOs to represent people accused of offences or likely to be affected by inquiries, and thereby facilitating fair and effective hearings. However, the direction does not suggest that the interests of the Commonwealth should be given priority only in that sense and it seems unlikely that it was either intended to be or was likely to be construed in such a theoretical or systemic manner. It seems rather to reflect a perception that, **whilst some conflicts of interest may be intolerable, DLOs should generally defend or otherwise represent people who may be accused of committing offences under Commonwealth law or of misconduct in connection with duties owed to the Commonwealth whilst, at the same time, continuing to accept an overriding duty not to provide advice that may be contrary to the Commonwealth's interests. Such an approach is entirely incompatible with what Street CJ described as the 'paramount' duty which a legal practitioner owes to his or her client.**[49]

4.63 Justice Crispin considered, however, that RLOs are in a different position to PLOs. He observed that, although the provisions of the DFDA imposing criminal sanctions for disobedience to superior orders apply to RLOs rendering continuous full-time service, on duty or in uniform, there are a number of considerations that grant them greater independence and impartiality than their permanent colleagues. The primary distinguishing factor was the possession of practising certificates. His Honour also noted that the nature of RLO's duties require them to be involved 'in the ADF culture on only a part-time basis.'[50]

4.64 The committee questioned the Director-General of the Defence Legal Service, Air Commodore Harvey, and the Chief Judge Advocate, Colonel Westwood, at length concerning the absence of a requirement to possess practicing certificates and the associated perceived lack of PLO independence.[51] A committee member questioned Air Commodore Harvey concerning conflicts inherent in the dual function of providing advice to commanding officers and defending personnel accused of committing Service offences. Air Commodore Harvey stated that the issues concerned a 'perception rather than a reality'.[52] When a number of scenarios were put to Air Commodore Harvey wherein a conflict could potentially arise, he conceded:

---

49 *Vance v Chief of Air Force,* paras 77–79. Emphasis added.

50 *Vance v Chief of Air Force,* para. 93.

51 *Committee Hansard* 6 August 2004, pp. 10–25.

52 *Committee Hansard* 6 August 2004, p. 23.

> It is something that I recognise is an issue that has to be very carefully managed and we are alert to it.[53]

4.65 The committee agrees with the findings made by Justice Crispin in the *Vance* decision concerning the flaws inherent in a system that does not require its lawyers to possess practicing certificates, and the impact this may have on perceived independence and impartiality. The committee is concerned that the potential exists for a lack of independence to go beyond perception and constitute reality. Practicing certificates require that lawyers undergo continual training to maintain their skills, and mandate that lawyers continually uphold and conform to codes of ethical and professional conduct. The committee considers that all PLOs should possess practising certificates—PLOs should be required to continually update their skills, and should be held to the same ethical and professional codes of conduct as other legal practitioners. The current failure of the military justice system to require that PLOs possess practicing certificates lets down PLOs and ordinary service personnel alike. The committee also notes that the Canadian Government has legislated to establish an independent Director of Defence Counsel Services, staffed by legal officers that *must* possess practising certificates.

The Canadian Director of Defence Counsel Services[54]

4.66 As part of a broad-ranging legislative program to reform its military justice system, the Canadian Government legislated to establish the office of the Director of Defence Counsel Services (DDCS).

4.67 The DDCS is an experienced lawyer who is also a legal officer in the Canadian Forces. The DDCS is appointed by the Minister of National Defence, and not through the chain of command. The Office of the DDCS provides legal counsel services to accused persons:

- at courts martial;
- who may be/are unfit to stand trial;
- in hearings for release from custody pending appeal, and retention in custody; and
- in appeals to the Court Martial Appeal Court or Supreme Court of Canada on the legality of a finding or severity of a punishment.

4.68 The Office also provides advisory services to:

- persons arrested or detained in respect of a Service offence;

---

53 *Committee Hansard,* 6 August 2004, p. 24.

54 The information for this section is drawn from Director of Defence Counsel Services *Manual* (No publication date specified), p. 4. Available from: http://www.forces.gc.ca/jag/military_justice/ddcs/publications/manual/complete_e.pdf unless otherwise specified.

- 'assisting officers' or accused persons with respect to electing trials by court martial;
- 'assisting officers' or accused persons on matters of a general nature relating to summary trials; and
- persons subject to an investigation under the Code of Service Discipline, a summary investigation or a board of inquiry.

4.69 Legal counsel and general advisory services are provided by qualified lawyers. DDCS lawyers are members of the Canadian Forces, and perform their duties under the supervision of the Canadian JAG. In addition to their obligations and duties under the National Defence Act, the Code of Service Discipline, and the Queens Regulations and Orders, they are also bound by the codes of professional conduct associated with the relevant law societies to which they belong. DDCS lawyers provide their clients with services akin to those typically provided by criminal lawyers in the civilian practice of law. The legislative framework creating the office of the DDCS is structured in a manner designed to enhance the independence of DDCS lawyers to the fullest extent possible:

> DDCS lawyers perform their duties and provide their services independent of the chain of command and of CF and Department of National Defence disciplinary and enforcement authorities. The sole restraints on the provisions of their services are those imposed by law and by professional ethics, including the requirements and constraints of solicitor-client privilege
>
> …
>
> In conducting their lawful and ethical activities in their capacity as defence counsel, DDCS are legally immune from any influence or authority purported to be exercised by the chain of command.[55]

4.70 At summary level, accused persons are not entitled to legal representation. However, accused persons, or the officer appointed to assist them through the summary process, may obtain the advice of a DDCS lawyer on general matters relating to the summary trial process. 'Assisting Officers' are not generally legally trained. It is their duty and responsibility:

- to assist in the preparation of and presentation at summary trial of the accused's case to the extent desired by the accused; and
- prior to the accused making an election to be tried by summary trial or court martial, to ensure that the accused is aware of the nature and

55 Director of Defence Counsel Services *Manual* (No publication date specified), section 1–4 and 3–4. Available from: http://www.forces.gc.ca/jag/military_justice/ddcs/publications/manual/complete_e.pdf

> gravity of the offences which he or she has been charged and of the differences between a summary trial and a court martial.[56]

4.71 At the court martial level, personnel are entitled to the services of and representation by a DDCS lawyer free of charge, or they may retain a civilian lawyer at their own expense or, where qualifying criteria are met, with the assistance of a provincial legal aid plan.

4.72 In discussing the establishment of the DDCS and the requisite degree of independence, the Canadian JAG stated:

> Military defence counsel must defend their clients against the prosecutorial powers of the State in circumstances where their client's actions and the defence counsel's arguments may be highly unpopular with senior members of the Canadian Forces. It is important to avoid any unnecessary or unintentional derogation from the actual and perceived independence of DDCS counsel.[57]

4.73 In his independent review of the Canadian military justice system, the Rt Hon Antonio Lamer commented:

> The creation of the DDCS was a great step forward in affording members of the Canadian Forces the protection of legal advice and representation that is intended to be independent of the chain of command.[58]

4.74 The committee notes the capacity for the Canadian DDCS to provide Service personnel with access to more independent and impartial legal advice than is currently available in Australia, and considers that the Australian Defence Force should provide similar access to its Service personnel.

Recommendation 16

4.75 The committee recommends that all Permanent Legal Officers be required to hold current practicing certificates.

Recommendation 17

4.76 The committee recommends that the ADF establish a Director of Defence Counsel Services.

---

56 In Australia, Defence Force personnel may only elect a court martial/DFM trial after the Summary Authority has heard the evidence adduced by the prosecution and determined that it supports the charge. After the Summary Authority has awarded a conviction, personnel may also elect to be punished by a court martial or DFM. (s131 DFDA).

57 Quoted in The Rt Hon Justice Antonio Lamer, *The First Independent Review by the Right Honourable Antonio Lamer P.C., C.C., C.D., of the Provisions and operation of Bill C-2,* pp. 15–16.

58 The Rt Hon Justice Antonio Lamer, *The First Independent Review by the Right Honourable Antonio Lamer P.C., C.C., C.D., of the Provisions and operation of Bill C-2,* p. 14.

Chapter 5

Disciplinary tribunals

5.1 This chapter examines the issues surrounding the structure of the disciplinary tribunals system. The committee acknowledges the point made in both the original and supplementary Defence submissions concerning the operational need for an effective military justice system in response to the unique requirements of military service. The committee also acknowledges the emphasis placed by Defence on the link between operational effectiveness and the military justice system as part of an effective chain of command to support commanders. In the supplementary submission to this inquiry, General Cosgrove, CDF stated:

> The control of the exercise of discipline, through the military justice system, is an essential element of the chain of command.[1]

5.2 The committee accepts this basic premise, but its acceptance is not unconditional. Despite acknowledging the general validity of this underlying proposition, the committee nonetheless holds concerns regarding the means through which operational effectiveness and the individual rights of Service personnel are balanced within the current disciplinary tribunal structure. The weaknesses in the system, described in submissions and evidence to this inquiry, evident in cross-jurisdictional comparison, identified in academic writings, and highlighted in recent Australian judicial decisions, all suggest that current structures are adversely affecting the rights of Service personnel.

5.3 Various submissions to this inquiry have invited the committee to consider the nature of disciplinary tribunals and appeals processes available to Service personnel. Evidence raised concerns regarding both the structure of Service tribunals and their operation. Both factors were identified as impeding the capacity of the disciplinary system to deliver impartial, rigorous and fair outcomes.

5.4 In an era where open and accountable governance is increasingly demanded by the citizenry, all arms of Government must be seen to deliver rigorous, fair and impartial outcomes—the military justice system should not be exempt. Evidence before the committee regarding the independence of Service tribunals suggested that the disciplinary process' capacity to provide basic standards of fairness and justice is problematic, especially when measured against the standards and protections afforded in overseas military justice systems. The root cause of this weakness appeared to be endemic to tribunal structures.

5.5 The committee also notes a recent decision of the High Court that raises questions concerning the validity of disciplinary tribunals.[2] In addition, it has

---

1 General Peter Cosgrove, Chief of Defence Force, *Submission P16F,* p. 1.

2 *Re Colonel Aird; Ex parte Alpert* [2004] HCA 44 (9 September 2004).

examined judicial and legislative developments overseas. At all times it remained cognisant of Australia's obligations under international instruments for the protection of human rights. The following section explores the various issues surrounding the two main disciplinary processes—courts martial (CM) and Defence Force Magistrate (DFM) trials, and summary disciplinary proceedings.

Courts Martial and Defence Force Magistrate Trials

Submissions

5.6 A number of submissions to the inquiry concerned the structure of Courts Martial and Defence Force Magistrate (DFM) trials, and made various recommendations aimed at improving their capacity to provide fair outcomes.

5.7 In his submission, the Judge Advocate General of the Australian Defence Force (JAG), Major General Justice Roberts-Smith discussed the desirability of formally establishing a standing military court to try DFDA offences currently tried at the court martial or DFM level.[3]

5.8 The JAG examined the evolution of the current disciplinary system, outlined overseas developments, and made a number of recommendations to improve the current Australian structure's independence and transparency. He based his recommendations on the inherent need to give Service personnel access to a fair and impartial tribunal.

5.9 The JAG noted that an obligation to protect an individual's right to a fair trial exists in both the UK and Canada, and is enshrined in the *European Convention of Human Rights* and *Canadian Charter of Rights and Freedoms* respectively.[4] He briefly outlined the development of tribunal structures aimed at protecting this right and observed that, although Australia does not possess a Bill of Rights per se, it is nonetheless a signatory to the *International Convention for the Protection of Civil and Political Rights* (ICCPR). The ICCPR provides in Article 14(1):

> In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by the law.[5]

5.10 The JAG's primary concerns about the current Australian model dwell on the capacity (or lack thereof) of DFM and CM tribunals to provide Service personnel with a fair and impartial trial. His concerns stem from the location of Judge Advocates and Defence Force Magistrates within the chain of command and the implications this has for their independence.

---

3 Major General Justice L.W. Roberts-Smith, *Submission P27*, p. 1.

4 Major General Hon Justice Roberts-Smith, Judge Advocate General, *Submission P27,* p. 2.

5 *International Convention on Civil and Political Rights* Article 14(1).

5.11 The JAG noted that the line of High Court decisions over the past decade challenging the validity of the DFDA have focussed primarily on constitutional and jurisdictional issues as opposed to a determination of their consistency with standards of impartiality and fairness. Even so, the High Court has seen fit to apply the principles enshrined in the ICCPR in other contexts. He commented that *Re: Tyler* (the major decision upholding the validity of the current DFDA structures) was decided almost a decade ago:

> Since that time, there have been significant developments affecting the court martial jurisdictions of our Commonwealth common law allies, in particular, the later decisions of the ECHR and the changes initiated by NZ. The question must arise as to whether the High Court, as currently constituted, would continue to uphold the existing arrangements under the DFDA in light of those changes overseas. It is also the case that the 'fair and impartial trial' issue has not been comprehensively argued before the court.[6]

5.12 In evidence to the committee on 21 June, the JAG further elaborated on this point, observing that the current structural arrangements under the DFDA do not fully reflect the considerable body of law that has developed overseas in recent years concerning the ability of Service tribunals to provide a fair and impartial trial. The JAG considered that a High Court challenge to the existing structure:

> Would at least be arguable in light of these developments and it would be better, in my view, to take a proactive approach at this stage.[7]

5.13 The JAG argued:

> I submit to the committee that consideration should be given to doing more to genuinely establish the perception (as well as the reality) of the independence of the JA's and DFM's consistent with the judicial functions of these appointments.[8]

5.14 The JAG's suggestions concerning the establishment of a permanent independent military court drew extensively from the Canadian model. He noted the 'distinct separation between the judicial, prosecution and defence functions',[9] and highlighted the complete independence of the appointment processes, tenure, and remuneration for military judges in the Canadian system.[10]

5.15 In the Australian context, the JAG argued that the establishment of a permanent and independent military court 'offers significant advantages',[11] including:

---

6 Major General Hon Justice Roberts-Smith, Judge Advocate General, *Submission P27,* p. 3.

7 *Committee Hansard,* 21 June 2004, p. 37.

8 Major General Justice Roberts-Smith, Judge Advocate General, *Submission P27,* p. 4.

9 ibid., p. 5.

10 ibid.

11 ibid.

- ensuring disciplinary tribunal compliance with Chapter III of the Commonwealth Constitution;[12]
- removing the perceived impartiality inherent in renewable terms of appointment;[13]
- providing perceived and actual independence for judge advocates and DFMs;[14]
- increasing the efficient expedition of interlocutory matters and the concomitant transferral of pre-trial issues to independent judicial officers;[15] and
- creating a smaller panel of judge advocates and DFMs, facilitating greater expertise and specialisation development.[16]

5.16 In terms of the actual operation of an independent tribunal, the JAG put forward a number of suggestions, including:

- altering the DFDA to allow JAs and DFMs to preside in a manner similar to civilian judges;[17]
- requiring published reasons;[18]
- establishing a military bench of the Federal Magistrate's Court,[19] or attributing appropriate status and perceived independence under the auspices of Chapter III of the Commonwealth Constitution (or an otherwise federally recognised court);[20]
- making judicial appointments to the bench analogous to Federal judicial appointments by the Governor-General, on the advice of the JAG;[21]
- making judicial appointments for renewable five-year terms during good behaviour, with automatic renewal unless a judicial committee recommends removal to the Governor-General (this arrangements falls, however, outside the scope of Chapter III compliance);[22]

---

12 ibid.

13 ibid.

14 ibid.

15 ibid.; *Committee Hansard,* 21 June 2004, p. 39.

16 Major General Justice Roberts-Smith*, Submission P27,* p. 5.

17 ibid.

18 ibid.

19 ibid.*,* pp. 5–6; *Committee Hansard,* 21 June 2004, p. 37.

20 *Committee Hansard,* 21 June 2004, p. 40.

21 Major General Justice Roberts-Smith *Submission P27,* pp. 5–6.

22 *Committee Hansard,* 21 June 2004, p. 37.

- judicial appointments until compulsory Service retirement age, with provision for part-time appointments to accommodate reservists (compliant with Chapter III).[23]

5.17 The JAG also proposed two alternative amendments to the current appeals processes. First, abolish automatic reviews and replace them with a right to request an appeal. Second, broaden the right of appeal to the DFDAT to include appeals against sentence. The JAG indicated the latter was his preferred option.[24]

5.18 He further suggested that an accused Service member could also be given a right to elect a trial by DFM or court martial when charged with an offence that is currently dealt with under the Summary trials process.[25] To enhance the independence of the position of JAG and DJAGs, the JAG also suggested the removal of renewable terms, and the introduction of fixed term appointments.

5.19 Mr David Richards, a lawyer specialising in military justice, provided a detailed account of various aspects of the disciplinary system, reviewed international developments and raised several matters of interest to the committee concerning the structure of disciplinary tribunals. Mr Richards highlighted his concerns regarding a fundamental lack of fairness, independence and impartiality in Service tribunals. He based his assertions on:

- an inherent conflict of duties through CDF's control over the appointment of convening authorities, who in turn control the forum and rules of a trial;[26]
- the very nature of the military adjudicating the military;[27]
- CDF's role in appointing judge advocates, court martial presidents and members, and DFMs;[28]
- the capacity for tribunals to determine which witnesses are required by the accused;[29]
- the capacity for tribunals to question witnesses, creating an inquisitorial style of hearing;[30] and
- reviews of convictions by commanding officers or military legal officers.[31]

---

23 Major General Justice Roberts-Smith, *Submission P27,* pp. 5–6.

24 ibid., p. 6.

25 ibid.

26 *Submission P38*, p. 13.

27 ibid.

28 ibid., pp. 17–19.

29 ibid., p. 24.

30 ibid.

5.20 Mr Richards highlighted several factors endemic to the military which he believed impede impartiality. He identified unlawful command influence, described as the 'mortal enemy of military justice',[32] as a significant factor inhibiting the independence of tribunal members.[33] Mr Richards drew from reasoning in High Court and European Court decisions to support the proposition that the chain of command may operate to influence the outcome of military tribunals, thereby denying a fair trial.[34] Mr Richards also identified bias in the disciplinary adjudication process, and stated that military tribunal members lack perceived independence due to their status as 'military personnel'.[35]

5.21 Drawing from a number of public statements from General Cosgrove and the Hon Mal Brough MP, (then Minister Assisting the Minister for Defence), Mr Richards also claimed that there is opposition to change within the ADF.[36] He stated:

> The direction given by the CDF and the Minister with portfolio responsibility for these issues, supports a perception that the Government is seeking to preserve its interests and investments in its leaders. Moreover, it appears that the Government is not willing to consider implementing any mechanism to improve the transparency and public accountability of military justice procedures.[37]

5.22 In evidence before the committee, Mr Richards expanded upon a number of points made in his submission. He outlined his objection to a person being given a criminal conviction, punished (potentially imprisoned), and stigmatised by a system that lacks impartiality and independence and does not meet the basic standards of fairness, impartiality or independence expected by Australian citizens:

> To allow a person's liberty to be taken away from them without procedural fairness and due process is a fundamental breach of the rights of an accused in the Australian system of criminal justice.[38]

5.23 Mr Richards considered that the ADF's discipline system lags behind world's best practice in upholding human rights and natural justice. He identified a need for radical change if the system is to approach the basic standards of impartiality and

---

31 David Richards, *Submission P38,* p. 29.

32 *United States v Thomas* (1986) 22 M.J. 388, 399 and Eugene Fidell, 'A World Wide Perspective on Change in Military Justice' *The Air Force Law Review,* vol 48 (2000), pp. 195–209, quoted in Mr David Richards, *Submission P38,* p. 84.

33 David Richards*, Submission P38*, p. 84.

34 *Findlay v United Kingdom* (1997) 24 E.H.R.R.221; *Hembury v. Chief of the General Staff* (1998) 155 A.L.R 514, as referred to in David Richards*, Submission P38,* pp. 84–88.

35 David Richards*, Submission P38*, pp. 92–94.

36 ibid., p. 77.

37 ibid., p. 79.

38 *Committee Hansard,* 9 June 2004, p. 35.

fairness established in other jurisdictions.[39] Mr Richards offered two alternatives through which change could be effected:

- a complete restructure of the Australian military justice system, bringing it into line with world best practice (especially drawing from Canada), involving:
  - the creation of a new military court using the judicial power under s71 of the Commonwealth Constitution;
  - the creation and appointment of independent military jurisdiction judges with fixed appointment until retirement;
  - structural change to military hearings to accommodate the role of the independent judges;
  - the application of the *Evidence Act 1995* and common law evidence principles to discipline system proceedings; and
  - a requirement for review and report every five years; or
- a modification of the current system which, although not creating a fully independent system, would go some way towards enhancing fairness, impartiality and independence.[40]

5.24 Mr Richard's first proposal is broadly consistent with the JAG's suggestion outlined above. His position differs slightly, however, in that he argued that both military and civilian judges should be eligible to sit on a military bench. He does not see military experience as a prerequisite for appointment.[41] In concluding his evidence to the committee, Mr Richards stated:

> I strongly supported in my opening statement today that the military should maintain total control over their employees in whatever fashion they need to do that. If there are criminal sanctions involved in maintaining discipline, so be it. I would support that.
>
> What I have issue with is somebody being investigated, charged and convicted of a criminal offence in the military system. That is what Justice Roberts-Smith is asking for. He is, as Senator Johnston said, a very eminent man. He is asking for a separate military court under the Federal Court system. That would go a long way if you did nothing with the investigations. The mere fact of having a separate Federal Court would mean that, if there were any deficiencies at the lower level, they would become apparent in the court and things would happen. I think it is a really

39 David Richards, *Submission P38*, pp. 95–96.

40 For further detail on the suggested amendments to the current system, see David Richards, *Submission P38*, pp. 95–100.

41 *Committee Hansard,* 9 June 2004, pp. 37, 46.

> important issue that Justice Roberts-Smith in his current position has asked for a separate military court.[42]

5.25 Mr Griffin also discussed a number of shortcomings with the current disciplinary tribunal system, and made suggestions for change.[43] Drawing from the evidence of the JAG and comments from members of the High Court during *Re Colonel Aird; Ex parte Alpert,* Mr Griffin asserted 'there are real concerns about the legal validity of the whole system.'[44] Since the completion of Mr Griffin's paper, a decision in the *Alpert* matter has been reached and is discussed below. The decision indicates that the constitutional validity of disciplinary tribunals remains a live issue. Mr Griffin also drew from international developments. To highlight the uncertainty about the validity of the current system, he stated:

> In the light of recent Canadian and UK developments on fairness and impartiality which were not fully addressed in the High Court trilogy of DFDA cases, the JAG's concerns about the potential for the system to be struck down seem well founded.[45]

5.26 Mr Griffin commented on the drawbacks of convening tribunals on an ad hoc basis,[46] and the inability of the current system to expedite interlocutory matters efficiently.[47] Mr Griffin stated:

> One may readily accede to the arguments in favour of a court of military officers trying a military offence of insubordination etc. Some may have difficulty accepting the importance of having that court of officers decide a strictly criminal offence such as stealing Commonwealth property. Some may have greater difficulty recognizing the need for, say a Royal Australian Air Force (RAAF) Reserve DFM, to travel from Melbourne to Townsville to try a charge against an Army soldier for stealing that property. This is particularly the case if the trial has been delayed pending the availability of that RAAF officer.[48]

5.27 In his paper, Mr Griffin examined the issues surrounding a standing court and tenured appointments, with particular reference to the desirability of limiting judicial appointments solely to military officers.[49] He noted that the European Court of Human Rights considered the civilian status and civilian trial experience of the British Judge Advocate to be an important safeguard in the British military justice system. Further,

---

42 *Committee Hansard,* 9 June 2004, p. 48.

43 Michael Griffin, Issues Paper.

44 Michael Griffin, Issues Paper*,* para. 34.

45 ibid, para. 35.

46 ibid.*,* paras 36–37.

47 ibid., para. 38.

48 ibid., para. 48.

49 ibid., para. 39.

that the Abadee report also affirmed the benefit of civilian experience (though it did not go so far as to endorse the substitution of civilian judges for military personnel). Mr Griffin noted that, at present, it is unlikely that there are any permanent military legal officers of the rank of senior major or above that have recent civilian trial experience and are available for judicial appointments. There are, however, many Reserve legal officers with relevant civilian and military experience.[50]

5.28 Mr Griffin accepted the:

> value and importance of having a court of military officers determining the charges against one of their peers on a military offence such as desertion or mutiny or insubordination or disobedience.[51]

5.29 He questioned, however, the 'importance of having that court of officers decide a strictly criminal offence',[52] especially when considered in light of the small volume of criminal matters tried in theatres of operation:

> A few courts and DFM trials have been conducted but almost all have been for service offences…Conversely, some serious criminal matters have been committed in theatre but were only tried on return to Australia.[53]

5.30 Statistics provided to the committee on 6 August 2004 by the Chief Judge Advocate, Colonel Ian Westwood, support this proposition.[54] Of the 29 Service personnel tried between 2000 and 2004, only four trials were conducted overseas, and all were Service, as opposed to criminal, charges.[55]

5.31 Mr Griffin cast doubt over the utility of maintaining a duplicate internal criminal justice system stating:

> The military justice system in its current form is an historic anachronism. It is a hangover from a time when the battlefield was so far removed from the normal world that the Defence Force needed to be self contained… However, this is no longer the situation and the civilian courts and civilian police are now readily available…There is no longer a requirement for the public purse to bear the cost of maintaining a separate but parallel criminal law process, particularly one which involves extensive delays and the risk of inept investigations and prosecutions.[56]

5.32 Mr Griffin offered a number of suggestions for reform, including:

---

50 ibid., paras 43–45.

51 ibid., para. 46.

52 ibid., para. 48.

53 ibid., para. 51.

54 Colonel Ian Westwood, *Tabled Documents 142, 143, & 144*, 6 August 2004.

55 *Tabled Document 143,* 6 August 2004.

56 Michael Griffin, Issues Paper, para. 54.

- removing criminal offences from the military justice system completely;
- removing criminal offences from the military justice system in peace-time Australia;
- creating a standing military court of judge advocates (JA) appointed by the Attorney-General on the basis of suitable civilian court experience;
- disestablishing the office of CJA and using the position to create a Judicial Registrar of Military Justice (JRMJ);
- JA to sit only with a court martial of military officers selected by the JRMJ;
- locating the JRMJ in Townsville or Darwin and giving him/her the power to deal with all interlocutory matters and pre-trial dispositions, as well as sitting as a JA/DFM;
- appointing at least two JA/DFMs in Darwin and Townsville;
- appointing JA/DFMs as statutory office holders until compulsory retirement age;
- appointing JA/DFMs from the Reserve only and on the recommendation of the JAG;
- appointing the JRMJ (and any additional JRMJ) from experienced DMP staff on the recommendation of the JAG;
- abolishing the automatic review of courts martial and DFM trials; and
- broadening appeal rights to the DFDAT to include appeals against sentence (for both defence and prosecution).

The High Court's decision in "Re Colonel Aird; Ex parte Alpert"

5.33 The committee is aware that a recent decision of the High Court, *Re Colonel Aird; Ex parte Alpert*[57] (the *Alpert* decision) raises several issues surrounding the validity of courts martial. The case concerned a soldier deployed to the Butterworth base in Malaysia. The soldier was charged with crimes allegedly committed whilst on recreational leave in Thailand.

5.34 By a 4-3 majority, the High Court held that it was a valid exercise of the Commonwealth's legislative power for the Parliament to make the soldier's alleged conduct a Service offence. The majority based their decision on the legislative power to make laws for the defence of the Commonwealth contained in s51(vi) of the Commonwealth Constitution. The majority interpreted the defence power broadly and linked the charges to the maintenance of Service discipline.

5.35 The High Court appeal was mounted against the validity of the charges laid against the soldier, and not the tribunal system trying the charges. Several Justices

57 *Re Colonel Aird; Ex parte Alpert* [2004] HCA 44 (9 September 2004).

indicated throughout the course of the hearing, however, that the constitutional validity of the military tribunal structure remained a live issue, and invited submissions concerning the validity of the purported exercise of the judicial power of the Commonwealth. Submissions on the subject matter were not, however, received.

5.36 Chapter III of the Commonwealth Constitution outlines the requirements for the exercise of judicial power, providing for the creation of judicial tribunals, the appointment of judges, and judge's conditions of tenure. Chapter III courts are independent from the parliament and the executive, as are the judges appointed to them. The independence of the judiciary is guaranteed by the judge's security of tenure—once appointed, federal judges are completely free from influence or interference when exercising the judicial function. Discussing the need for security of judicial tenure, Sir Robert Garran stated:

> The particular stringency of the provisions for safeguarding the independence of the Federal Justices is a consequence of… the necessity for protecting those who interpret it from the danger of political interference.[58]

5.37 Military tribunals are not constituted in the same manner as courts created under Chapter III of the Constitution. The provisions concerning judicial appointments, and the measures designed to impart independence and impartiality to civilian courts, do not apply to military tribunals. Whereas in Chapter III courts, judges are appointed by the Governor-General in council and have life tenure, in the military justice system, judicial officers are appointed from and responsible to the chain of command, and do not have the same security of tenure.

5.38 Prior to the *Alpert* decision, three High Court decisions failed to produce a consensus position on the validity of the DFDA in this respect or the conditions under which military tribunals may validly exercise a judicial function.[59] Although all three decisions held that courts martial may validly try strictly disciplinary offences, differences of opinion arose regarding court martial jurisdiction over civilian criminal charges and disciplinary charges involving civilian criminal elements. The High Court has determined that courts martial stand as exceptions to the general separation of powers principle contained in the Constitution, but has not conclusively determined the basis or extent of the exception. In each of the three previous decisions, the High Court has split on the reasoning upholding the validity of court martial jurisdiction.[60]

5.39 The *Alpert* decision has done little to clarify matters. In the course of hearing the *Alpert* appeal on 3 March 2004, several Justices indicated that they were prepared to hear arguments regarding the validity of courts martial under Chapter III of the

---

58 Sir Robert Garran, *Commentaries on the Constitution of Australia,* Digital Text, University of Sydney Library, available from http://setis.library.usyd.edu.au/ozlit/pdf/fed0014.pdf

59 *Re Tracey; Ex parte Ryan* (1989) 166 CLR 518; *Re Nolan; Ex parte Young* (1991) 172 CLR 460; *Re Tyler; Ex parte Foley* (1994) 181 CLR 18.

60 *Re Tracey; Ex parte Ryan* (1989) 166 CLR 518; *Re Nolan; Ex parte Young* (1991) 172 CLR 460 ; *Re Tyler; Ex parte Foley* (1994) 181 CLR 18.

Constitution.[61] The parties to the case did not, however, make submissions to the Court, despite invitations to do so. Chief Justice Gleeson and Justices McHugh, Gummow, Hayne, Callinan and Heydon therefore excluded Chapter III considerations from their decisions. Justice Kirby, however, chose to discuss the Chapter III dimension, stating:

> This Court must uphold the Constitution. It must do so where the consequence of failure is a serious departure from past authority and constitutional history; the enlargement of a limited exception to Ch III of the Constitution; and an expansion of military law that is undesirable and out of keeping with our constitutional tradition. No agreement of the parties or concessions or assumptions in the course of advancing their arguments can excuse this Court from its duty to maintain the constitution and its own past decisional authority in such an important matter.[62]

5.40 Justice Kirby warned against the extension of military tribunal's capacity to try civilian offences:

> That conclusion could effectively exclude Australian criminal courts from their usual role in such trials. It could authorise a switch of the trials of defence personnel for crimes of rape to military tribunals, away from the ordinary courts, whose adjudications members of the public may more conveniently view, learn from and criticise. In practical terms, the election by a complainant could deprive service personnel in Australia of the ordinary right of jury trial in such matters. It could exclude citizens, as jurors, from participation in such trials. This Court may, as it pleases, ignore these consequences of expanding the ambit of service offences outside Chapter III. But it is a step opposed to past legal authority. It is antagonistic to very long constitutional history. It is also inconsistent with the Court's recent doctrine on Chapter III. And it is antithetical to the functions of citizen jurors and the rights of service personnel, enjoyed as Australian citizens, and long observed in the courts of our legal tradition.[63]

5.41 When discussing the value of independent courts constituted in compliance with Chapter III, compared to the nature of military tribunals, Justice Kirby further stated:

> The independent courts exist not for the benefit of the judiciary. They uphold the Constitution and defend the people of the Commonwealth and those dependent on its protection. The exceptions for service discipline should not be expanded. The true independence and impartiality of service tribunals has long been questioned in Australia. 'Typical criticisms of service tribunals…include: the tribunal may be concerned to adhere to the

---

61 *Ex parte Alpert—Re Aird & Ors* [2004] HCA Trans 42 (3 March 2004). Gleeson CJ, Kirby, McHugh and Gummow JJ all raised Chapter III issues in the course of hearing arguments from the prosecutor and respondents.

62 Kirby J, *Re Colonel Aird; Ex parte Alpert* [2004] HCA 44 (9 September 2004) at para. 151.

63 Kirby J, *Re Colonel Aird; Ex parte Alpert* [2004] HCA 44 (9 September 2004) at para. 113.

> views of those higher in the chain of command; the tribunal members may be personally acquainted with or even in command over the accused; and the members' career aspirations may influence their conduct in the trial.' Chapter III of the Constitution provides protections for judicial independence through security of tenure and the maintenance of a long tradition of impartiality. Extending the meaning of 'service offence' to the present case means that such protections are bypassed.
>
> …
>
> The very fact that there have been three major investigations into 'military justice' or the 'military judicial system' in Australia in quick succession speaks volumes about the seriousness of the problems that tend to be endemic in such a system. The culture of the military is not one in which independent and impartial resolution of charges comes naturally. These considerations reinforce the need for great caution in expanding the reach of the system of service tribunals, particularly in time of peace.[64]

5.42 Justice Kirby also discussed the importance of instilling civilian judicial principles and protections into the military disciplinary system:

> The services have sometimes endeavoured to cut themselves off from ordinary law. In special and limited circumstances, where it is proportional and appropriate for national defence, it must be so, at least for a short time, as during actual conflict. But under the Australian Constitution, the armed services are not divorced from civil law. Indeed, they exist to uphold it. It is the duty of this Court to maintain the strong civilian principle of the Constitution. It is one of the most important of Australia's legacies from British constitutional law.[65]

5.43 Dicta from the *Alpert* decision suggests that members of the High Court may be willing to reconsider the Constitutional validity of Service tribunals. In light of several comments made during the course of proceedings, the committee suggests that it might be timely for the Government to consider questions of independence and impartiality in disciplinary tribunal structures.

5.44 Amending current structures to reflect the provisions of Chapter III would be a means of circumventing a potential challenge to the Constitutional validity of disciplinary tribunals. The discipline system should be reformed to impart greater independence and impartiality into tribunal structures. This would provide Defence personnel with a discipline system that more fully protects their rights, reflects the principles and guarantees underpinning the Commonwealth Constitution, and could prevent a potential finding of Constitutional invalidity.

---

64 Kirby J, *Re Colonel Aird; Ex parte Alpert* [2004] HCA 44 (9 September 2004) at paras 137-138.

65 Kirby J, *Re Colonel Aird; Ex parte Alpert* [2004] HCA 44 (9 September 2004) at para. 145.

Overseas developments

5.45 Recent overseas developments also indicate that the current Australian disciplinary system is outdated and may not adequately protect Service personnel's rights. The JAG and other experts in the field drew the committee's attention to developments in Canada and the United Kingdom. Both these jurisdictions possessed similar structures to Australia's and introduced wide ranging programmes of reform. The rationale behind these modernisation processes suggests a need for similar 'root and branch' change in Australia.

5.46 A number of academic works discussing various overseas military justice developments also lend considerable weight to arguments advanced in support of broad-based Australian reform. These works often undertake inter-jurisdictional comparative analysis, are instructive insofar as they provide insight into the benefits and detriments of different models, and echo many of the issues and concerns raised in this inquiry.

5.47 Notably, commentators have tracked the increasing fusion of civilian judicial norms and principles in the military justice sphere, creating systems with far greater independence and impartiality. Mr Eugene Fidell notes:

> One country after another has in recent times focussed on issues of independence and impartiality in the administration of military justice.[66]

5.48 These reforms have apparently extended and protected the basic human rights of Service personnel whilst simultaneously serving the operational requirements of the relevant Defence force.

Canada

5.49 Canadian reform occurred following legal challenges to the structure of the disciplinary system. *R v. Généreux*[67] was the main decision challenging the validity of Service tribunals. In *Généreux,* the Supreme Court of Canada concluded that the court martial system violated constitutional guarantees to an independent and impartial trial. Courts martial were found invalid because of the commanding officer's role and the potential for someone located within the chain of command to interfere in matters directly and immediately relevant to the adjudicative function.[68] Perhaps most significantly, the Court held that actual lack of independence need not be established. The test should be whether an informed and reasonable person would perceive the

---

66 Eugene R.Fidell, 'A World-Wide Perspective on Change in Military Justice', in *The Air Force Law Review,* vol 48 (2000), pp. 195–209.

67 [1992] 1 S.C.R 259.

68 For a detailed discussion on the rationale in the *Généreux* decision, see Jerry S.T.Pitzul and John C.Maguire, 'A Perspective on Canada's Code of Service Discipline' in Eugene R.Fidell and Dwight H.Sullivan, *Evolving Military Justice,* Naval Institute Press (Annapolis, 2002), pp. 233–245.

tribunal to be independent—in other words, 'the legal framework governing the status of the tribunal as opposed to the actual good faith of the adjudicator'.[69]

5.50 *Généreux* provided the impetus for a raft of changes to the Canadian disciplinary system. In 1999, *Bill C-25* was enacted. It granted personnel the right to elect trial by court martial for all but the most minor disciplinary offences; altered the appointment of judges (now by the Governor in Council and therefore outside the chain of command); and established a courts martial administrator to convene courts martial at the request of the Canadian DMP.

5.51 In 2003, the Rt Hon Antonio Lamer completed a review of the Canadian military justice system to assess the impact of the reform programme.[70] Lamer asserted that an independent military judiciary is the hallmark of a fair military justice system, and concluded that *Bill C-25* had enhanced the independence of military judges by including provisions outlining the appointment, terms and functions of military judges. He considered, however, that these reforms had not gone far enough to ensure independence and impartiality, stating:

> To further ensure judicial independence, I am recommending the creation of a permanent trial level military court, with judges appointed until retirement.[71]

5.52 Lamer argued that the establishment of a permanent court would not only protect the constitutional right to a fair, independent and impartial trial, but would also allow an independent judge to deal with pre-trial and interlocutory issues.[72] When weighing up the benefits of establishing a permanent court, Lamer stated:

> Constitutionality is a minimum standard…those responsible for organizing and administrating a military justice system must strive to offer a better system than merely that which cannot be constitutionally denied.[73]

5.53 The proactive approach advocated by Lamer was endorsed by the Australian JAG. The committee notes the apparent benefits of the Canadian reform programme and urges the Australian Government to adopt a similarly proactive approach to improving the disciplinary system.

United Kingdom

5.54 Reform has also been undertaken in the UK. Again, legal challenges to the validity of courts martial provided the impetus for change. The watershed decision

---

69 ibid., p. 240.

70 The Rt Hon Justice Antonio Lamer, *The First Independent Review by the Right Honourable Antonio Lamer P.C., C.C., C.D., of the Provisions and operation of Bill C-25.*

71 ibid., p. 2.

72 ibid., p. 26.

73 ibid., p. 21.

was *Findlay v United Kingdom.*[74] In *Findlay*, the European Court of Human Rights determined that courts martial were not sufficiently separated from the chain of command to be considered 'impartial tribunals' for the purposes of Article 6 of the European Convention on Human Rights. Article 6 of the European Convention reflects the provisions of Article 14(1) of the ICCPR, discussed above at paragraph 5.9.

5.55 Lack of impartiality stemmed from the role and position of the convening authority (a non legally-qualified officer) in the disciplinary process. Prior to the post-*Findlay* structural changes, the convening authority was responsible for:

- making the decision to prosecute;
- deciding the charges to be answered;
- appointing the prosecutor;
- exercising executive control of the proceedings;
- selecting members of the court martial (who may come under his or her authority in the chain of command);
- confirming any sentence awarded by a court martial; and
- determining whether to allow an appeal.

5.56 The Court was concerned that the convening authority's multiple roles raised the potential for unlawful command influence. In her discussion of the implication of the *Findlay* decision, Lyon stated:

> There was certainly an appearance of a lack of complete independence of the court from the convening officer…A reasonable man would most certainly conclude that there was a real possibility that a member of the court might be unconsciously influenced by his military and subordinate relationship to the convening officer, that this unconscious influence would prevent him from considering the evidence before him solely on its merits, and that there was a real danger of that unconscious influence causing injustice to the accused, even if there was no evidence of any actual lack of impartiality or of any attempt by the convening officer to influence the court.[75]

5.57 In 1996, the British Government introduced the *Armed Forces Act* to remedy the shortcomings highlighted in *Findlay*. The role of convening authority was abolished, and its functions distributed among three different bodies. The prosecuting

74 19972 Eur. Ct. H.R. 263.

75 Ann Lyon, 'After *Findlay*: A consideration of some aspects of the military justice system' in Eugene R.Fidell and Dwight H.Sullivan, *Evolving Military Justice,* Naval Institute Press (Annapolis, 2002), p. 221.

authority, courts martial administration officer and reviewing authority are now all distinct from one another, and have clearly delineated powers and personnel.[76]

5.58 The 2003 European Court of Human Rights decision *Grieves v. The United Kingdom*[77] led to further reform to the British military justice system. In *Grieves* the court found that Naval courts martial lacked independence and impartiality due to the role of the Judge Advocate. In the course of reaching its decision, the Court commented:

> The Court recalls that in order to establish whether a tribunal can be considered 'independent', regard must be had, inter alia, to the manner of appointment of its members and their term of office, the existence of guarantees against outside pressures and to the question whether the body presents an appearance of independence.
>
> In this latter respect, the Court also recalls that what is at stake is the confidence which such tribunals in a democratic society must inspire in the public and above all, as far as criminal proceedings are concerned, in the accused.[78]

5.59 The Court noted that in the UK, Army and Air Force Judge Advocates are civilians working full time for the civilian Judge Advocate General. Army and Air Force Judge Advocates are therefore located outside the chain of command, and free from command influence. By contrast, however, Naval Judge Advocates are serving naval officers appointed by the Chief Naval Judge Advocate (CNJA), who is also a naval officer. This arrangement is analogous to the current Australian situation. The Court found that the nature of a Judge Advocate's appointment and his or her position within the chain of command was not a strong guarantee of independence, and concluded:

> The lack of a civilian in the pivotal role of Judge Advocate deprives a naval court-martial of one of the most significant guarantees of independence enjoyed by other services' courts-martial.[79]

5.60 Following the *Grieves* decision, the British Government amended the procedures for appointing Naval Judge Advocates. They are now appointed by the same body responsible for appointing Army and Air Force judge advocates, further enhancing the independence and impartiality of courts martial.

---

76 For a detailed discussion on the reforms to the British court martial structures, see Ann Lyon, 'After *Findlay*: A consideration of some aspects of the military justice system' in Eugene R.Fidell and Dwight H.Sullivan, *Evolving Military Justice,* Naval Institute Press (Annapolis, 2002), p. 221; and G.R.Rubin, 'United Kingdom Military Law: Autonomy, Civilianisation, Juridification' in *The Modern Law Review,* vol. 65, no. 1 (January 2002), pp. 36–57.

77 [2003] ECHR 683 (16 December 2003).

78 [2003] ECHR 683 (16 December 2003), para. 69.

79 [2003] ECHR 683 (16 December 2003), para. 89.

5.61 The committee notes that the British Government is currently developing a legislative programme to further reform the military justice system. The new programme seeks to harmonise the framework and extend the reforms previously discussed across all three Services. Perhaps most significantly, the Ministry of Defence's M*emorandum: Tri-Service Armed Forces Bill* indicates that the legislative programme will lead to the creation of a standing court-martial, rather than ad hoc courts.[80] The Memorandum explicitly states that the proposals under consideration 'maintain an approach that is evolutionary rather than revolutionary.'[81]

United States of America

5.62 The independence and impartiality of military tribunals has been a contentious issue in the USA. Similar to the issues encountered in Canada and the UK, debate centres on the benefits of establishing an independent military judiciary and the position of the military judge.

5.63 Frederick Lederer and Barbara Zeliff provided an articulate explanation of the differences between military and civilian judges:

> The military judiciary is unique. Civilian judges in the US are either elected or appointed. Once named to the bench, they are not subject to the direction of any other person, and, absent removal proceedings, they remain on the bench until death, resignation or completion of the judicial term. Judicial independence is one of the defining elements of the civilian judiciary. The military judge, on the other hand, is appointed by the judge advocate general (JAG) of the appropriate armed service, serves without a fixed term at the pleasure of the JAG, and is evaluated at least annually by senior officers. Subsequent promotion and reassignment depend on the judge's annual officer evaluation and the personal knowledge and desires of the senior officers responsible for assignments.[82]

5.64 Lederer and Zeliff asserted that the military judiciary's independence problem is an 'inherent consequence' of its historical and statutory 'command control' basis. They identify the risk of, albeit subtle, 'command retaliation':

> The risk of 'command' retaliation—actions taken by more senior judges or by the JAG or his or her subordinates—can be very subtle. Any number of administrative decisions adverse to a judge can be taken in such a way as to defy either detection or clear causation. Real or perceived limitations on the independence of military judges stem directly from the structure of the

80 British Ministry of Defence *Memorandum: Tri-Service Armed Forces Bill,* p. 8.

81 British Ministry of Defence *Memorandum: Tri-Service Armed Forces Bill,* p. 5.

82 Fredric I. Lederer and Barbara Hundley Zeliff 'Needed: An Independent Military Judiciary. A proposal to Amend the Uniform Code of Military Justice', p. 28.

> military legal system, complicated by the culture within which the judiciary exists.[83]

5.65 Lederer and Zeliff recommended the creation of an independent military court. They recognised the benefit of military experience, acknowledging that an independent military bench should be staffed with personnel that have an adequate appreciation of the subtleties of military service. They emphasised, however, the importance of independence after appointment to the bench:

> The key to the proposal is the careful mix of selection provisions with post-selection independence.[84]

5.66 The American Judges Association has also commented on the position of military judges:

> The perception is that without tenure, a military judge is subject to transfer from the service judiciary should he/she render unpopular evidentiary rulings, findings or sentences. There is no protection from retaliatory action by dissatisfied superiors in the chain of command. Similarly, the perception exists that judges who make rulings unpopular with [the] military hierarchy are endangering their possibilities of promotion because that same hierarchy is the system which makes selections for promotion.[85]

5.67 Eugene Fidell also makes some incisive observations about the nature of military tribunals and judges. He contrasts the position of military judges with civilian judges, noting the independence of the appointment process and tenure enjoyed by the latter:

> The civilian federal standards of review the Court of Appeals has embraced emerged in the context of appellate review of decisions by senatorially confirmed district judges with the protection of life tenure subject only to removal by impeachment. Military trial judges, however, are not senatorially confirmed *as judges*. They preside over courts that appear without warning and vanish without a trace, in contrast to the district courts, some of which have been in continuous operation for two hundred years or more. Unlike their civilian counterparts, military judges are selected by the judge advocates general and are subject to evaluation like other commissioned officers. They enjoy no protected term of office and are therefore subject to removal without cause, subject only to the Court of Appeals (in my view) illusory and inadequate promise in *United States v*

---

83 Fredric I. Lederer and Barbara Hundley Zeliff 'Needed: An Independent Military Judiciary. A proposal to Amend the Uniform Code of Military Justice', p. 39.

84 Fredric I. Lederer and Barbara Hundley Zeliff 'Needed: An Independent Military Judiciary. A proposal to Amend the Uniform Code of Military Justice', p. 56.

85 Quoted in Fredric I. Lederer and Barbara Hundley Zeliff 'Needed: An Independent Military Judiciary. A proposal to Amend the Uniform Code of Military Justice', p. 29.

> *Graf* that they will be protected from retaliatory removal. Military judicial discipline remains a secret.[86]

5.68 These various critiques of the American military justice system are useful to discussions surrounding the reform of Australia's military justice system. Australian Judge Advocates similarly lack tenure, are appointed from within the chain of command, and preside over tribunals that 'appear without warning and vanish without a trace'.

Committee view

5.69 The committee notes the reforms undertaken in other jurisdictions to address many of the difficulties currently experienced in Australia. Whilst not advocating an unquestioning whole-sale transplantation of a particular overseas model, the committee nonetheless feels that these developments should be examined in detail to extract useful lessons for the reform of our own military justice system.

5.70 Most notably, where other jurisdictions have encountered difficulties with the impartiality and independence of courts martial, they have removed the adjudicatory function from the chain of command, or are in the process of doing so. The growing international trend towards appointing tenured independent military judicial officials and creating standing military courts allows those Service personnel access to independent and impartial tribunals, and should not go unnoticed in Australia.

Tribunals and Appeals – Summary Authorities

5.71 The vast majority of offences prosecuted under the DFDA are tried at the Summary Authority level. The committee acknowledges the need for speedy and efficiently administered summary justice, and recognises its role in supporting commanding officers and maintaining Service discipline. However, inadequate summary processes have the capacity to affect a higher proportion of Service personnel than defective courts martial and DFM trials, and by failing to appear to provide just outcomes, can serve to undermine the very system they mean to strengthen. It is therefore important to address issues arising in the summary discipline context.

5.72 The JAG indicated in his submission to this inquiry:

> Summary Trials conducted by commanding officers and subordinate summary authorities present their own difficulties. In my view it is not possible to imbue these tribunals with guarantees of independence appropriate to the higher level tribunals.[87]

---

86 Eugene R. Fidell 'Going on Fifty: Evolution and Devolution in Military Justice' in Eugene R.Fidell and Dwight H.Sullivan, *Evolving Military Justice,* Naval Institute Press (Annapolis, 2002), p. 23.

87 Major General Justice Roberts-Smith, Judge Advocate General, *Submission P27,* p. 6.

5.73 The JAG did not elaborate on these comments in his evidence to the committee, but did recommend that consideration should be given to providing an accused with the right to elect a trial before a DFM or court martial.[88]

5.74 The committee is aware that summary tribunals, structured similarly to Australia's, have been declared invalid in the UK, and have undergone significant change to enhance their impartiality and independence. Because of the improved protection of individual rights, and their enhanced capacity to provide impartial, rigorous and fair outcomes, the British reforms are therefore of particular interest to the committee.

5.75 Prior to 1996, the summary discipline structure in the UK was very similar to the current Australian model. In 1996, a right to elect trial by Court Martial was introduced following the passage of the Armed Forces Act. As was outlined previously, British courts martial are independent from the military, and it was thought that introducing a right to elect a trial by court martial would protect Service Personnel's right to access a fair and independent tribunal. If an accused elected trial by Summary Authority, however, the process was the same as the current Australian process, and review was only possible through the chain of command.

5.76 In 2000, following the UK's ascension to the European Convention on Human Rights (ECHR), the system was again altered to further protect the right to a fair trial with the establishment of the Summary Appeals Court (SAC). The SAC supplements the right to elect a trial before court martial, ensuring that those who are dealt with summarily have a second avenue to an ECHR compliant independent court.

5.77 The SAC consists of an independent Judge Advocate and two officers generally of the same Service as the appellant. When an individual is found guilty by their CO, they have 14 days to lodge an appeal against their conviction with the SAC. The appeal on finding, or on finding and sentence takes the form of a re-hearing along the lines of an appeal to the British Crown Court from a decision of the magistrate's court. The rules of evidence mirror those in the civilian system, with appropriate modifications. Where the appeal is on sentence alone, and there is no material dispute as to facts, the court will only hear a statement of facts followed by pleas in mitigation. The appellant is entitled to legal representation at the hearing of his or her appeal, and is entitled to apply for legal aid for this purpose, under the Service's legal aid system. Hearings before the SAC are held in public. Appeals are possible on points of law only to the High Court.

5.78 The capacity to elect trial by court martial and appeal summary convictions to the SAC gives the British summary discipline model a considerably greater degree of independence than the current Australian model. The committee considers that the introduction of similar mechanisms would better protect ADF personnel's rights and contribute to the provision of impartial, rigorous and fair disciplinary outcomes.

---

88 Major General Justice Roberts-Smith, Judge Advocate General, *Submission P27,* p. 6.

Findings and recommendations

5.79 It is becoming increasingly apparent that Australia's disciplinary system is not striking the right balance between the requirements of a functional Defence Force and the rights of Service personnel, to the detriment of both. Twenty years since the introduction of the DFDA, the time has come to address seriously the overall viability of the system. Australian judicial decisions and the evidence before this committee suggest the discipline system is becoming unworkable and potentially open to challenge on constitutional grounds. Overseas jurisprudence and developments suggest that alternative approaches may be more effective.

5.80 The Committee recognises that peripheral improvements to the disciplinary system have been made. A piecemeal approach to reform, however, is proving increasingly ineffective and untenable. The time has come to address the more fundamental underlying structural weaknesses within the military justice system. A fork in the road is rapidly approaching concerning the administration of the disciplinary system.

5.81 Based on the evidence to this inquiry, leaving the disciplinary structures within the military justice system unchanged is clearly not viable. The status quo leaves too many members of the ADF exposed to harm. Overseas jurisdictions have increasingly moved towards structures that impart greater independence and impartiality. The approaches taken overseas were endorsed by the Judge Advocate General, Mr David Richards, Mr Michael Griffin and a considerable body of academic commentary.

5.82 Modern trends in governance emphasise greater openness, accountability, independence and impartiality where matters affecting citizens rights are concerned. The Defence Forces should not be exempt from this trend. Members of the ADF are subject to conditions of service unlike any other. It is therefore incumbent upon the Government and society as a whole to ensure that their rights and freedoms are protected to the fullest extent possible.

5.83 The committee reiterates the view expressed at the outset of its consideration of the discipline system that, in the first instance all 'non-military' offences should be removed from the military justice system. This would entail the referral of all offences currently under the DFDA that have a civilian equivalent or involve civilian criminal elements, in addition to all offences caught by s61 of the DFDA (all offences that are criminal in the Jervis Bay Territory) to the relevant civilian authorities for prosecution in the civilian courts.

5.84 The committee notes, however, that cases may be referred back into the military justice system. There may still be a need to prosecute these offences, in addition to offences that have no civilian equivalents, for the purposes of maintaining Service discipline. The committee holds the opinion that there is a need for fundamental structural reform to impart greater independence and impartiality into current tribunal structures.

5.85 An independent Permanent Court, staffed by independently appointed judges possessing extensive civilian experience, would extend and protect Service personnel's inherent rights and freedoms, leading to more impartial, rigorous and fair outcomes. Appointing Judges that may have had military experience, in addition to their extensive civilian experience, would render them capable of appreciating the exigencies of military service and the nature and purpose of Service discipline, simultaneously serving both the Service and Service member, to the benefit of both.

5.86 The Government should not wait for disciplinary tribunals to come under constitutional challenge before acting to address the weaknesses inherent within the current system. Rather, it should adopt a proactive stance and protect Service personnel *now*. Nor should the Government adopt 'constitutionality' as its minimum standard. The goal should not be to establish a system that will merely gain the approval of the High Court. The goal should be to structure a tribunal system that can protect the rights of Service personnel to the fullest extent possible, whilst simultaneously accommodating the functional requirements of the ADF.

5.87 Numerous witnesses and submitters to this inquiry have emphasised the need for the ADF to have the ability to maintain Service discipline as a means to enhance the operational effectiveness of the military. As quoted earlier, in both his main and supplementary submissions, General Cosgrove reinforced the operational need for an effective military justice system in response to the unique requirements of military service, stating:

> The control of the exercise of discipline, through the military justice system, is an essential element of the chain of command. This has not been challenged during the Inquiry and remains a significant distinguishing feature of military justice.[89]

5.88 Mr Neil James of the Australian Defence Association, also supported the notion that military discipline was essential to the operational effectiveness of the Defence Forces. He stated:

> The association considers the following broad philosophical and practical points are relevant to any review of the military justice system. First, a democracy cannot maintain an effective Defence Force without that force being subject to a code of disciplinary legislation that specifically covers the purposes, situations, conditions and exigencies of war. No extension of civil codes of law can, or necessarily should, meet those requirements. This inquiry, therefore, is surely about improving the Defence Force Discipline Act rather than abolishing it. Second, discipline is both a lawful and an operationally essential component of command.[90]

5.89 The Judge Advocate General, standing statutorily independent of the ADF, and appointed by the Governor General, endorsed the principle of ADF control over

---

89 General Peter Cosgrove, Chief of Defence Force, *Submission P16F.*

90 *Committee Hansard,* 9 June 2004, p. 20.

the discipline system. Whilst discussing his suggestions for reform with the committee, the JAG stated:

> The first and fundamental point is that we are not talking about an exercise of the ordinary criminal law—although in some areas, as I am sure the committee appreciates, they overlap. It is a military discipline system. The object is to maintain military discipline within the ADF by a system which is, and is seen to be, fair and just and which serves the purpose of military discipline, which is, ultimately, success in battle. The historical need for a discipline system internal to the military force has been recognised by the High Court of Australia in a number of cases—and I think I have referred to them in my submission. So that need, as I would see it, is beyond debate in terms of principle
>
> …
>
> The second point I would make is that it is essential, in my view, to have knowledge of and understanding of the military culture and context. This is something much more than being able to understand specialist evidence in a civil trial. There is a need to understand the military operational and administrative environment and the unique needs for the maintenance of discipline of a military force, both in Australia and on operations and exercises overseas. The third point is that the system must have credibility: credibility with and the acceptance of the Defence Force. It has been suggested that civilian judges have been seen as a success and accepted by the army and the Royal Air Force in the United Kingdom, but that view certainly is not universally held within the armed forces in the UK, as my recent discussions have shown.
>
> The fourth point is that Canada, for example, which is very comparable to Australia in this regard, is firmly of the position that military judges be serving military officers, but, again, that they have structured, legislative, guaranteed independence. Finally, the disciplinary tribunal, the court martial or Defence Force magistrate, as I have already observed, must be able to sit in theatre and on operations. It has to be deployable.[91]

5.90 Suggestions for an independent court contemplate and accommodate the need for ADF control over discipline, yet still allow for the protection of individual rights. The evidence to this inquiry shows that an independent judiciary could simultaneously support the maintenance of Service discipline, maintain operational effectiveness, and protect the rights of Service personnel.[92]

5.91 The committee reiterates Recommendation One: all suspected criminal activity in Australia should be referred to the appropriate State/Territory civilian police for investigation and prosecution before the civilian courts.

---

91 *Committee Hansard,* 21 June, pp. 43–44.

92 *Committee Hansard,* 21 June 2004, p. 36.

5.92 Where, however, offences are referred back to the military, Service members should still retain the right to access independent and impartial tribunals for the determination of their guilt or innocence. Their decision to serve and defend Australia should not mean that they sacrifice the basic right to a fair trial possessed by every Australian citizen. Where the military purports to exercise jurisdiction over Service offences, the committee considers that this should only be done through a court created under Chapter III of the Commonwealth Constitution.

5.93 The committee considers that a Permanent Military Court, created possibly as a division of the Federal Magistrates Court, would offer a number of benefits:

- Service members charged with referred civilian equivalent, Jervis Bay Territory and non-civilian offences would exercise the same rights to a fair and impartial hearing as every other Australian citizen;
- judges would be independently appointed by the Governor-General in council and have tenure until retirement age, removing current perceptions of a lack of independence;
- the likelihood of constitutional invalidity is reduced;
- judges would have extensive experience within the civilian justice system;
- the Court would be open, enhancing the visibility of military justice to the general public and Service personnel alike;
- consistent decision-making would be promoted through the creation of a body of precedent;
- interlocutory and pre-trial matters would be dealt with by an independent and impartial judge;
- the considerable costs and inconveniences associated with the current ad hoc convening of Service tribunals would be removed;
- judges appointed to the bench would have military experience, enabling them to appreciate the institutional context within which military discipline applies, but would be completely independent from the ADF;
- Australia would uphold its obligation under Article 14(1) of the ICCPR; and
- the Australian system would be consistent with world's best practice.

Recommendation 18

5.94 The committee recommends the Government amend the DFDA to create a Permanent Military Court capable of trying offences under the DFDA currently tried at the Court Martial or Defence Force Magistrate Level.

Recommendation 19

5.95 The Permanent Military Court to be created in accordance with Chapter III of the Commonwealth Constitution to ensure its independence and impartiality.

- **Judges should be appointed by the Governor-General in Council;**
- **Judges should have tenure until retirement age.**

5.96 The committee considers that judges appointed to the Permanent Military Court should have recent and extensive civilian legal experience. This would be best achieved by ensuring that appointees to possess at least five years recent experience in civilian courts at the time of appointment.

Recommendation 20

5.97 The committee recommends that Judges appointed to the Permanent Military Court should be required to have a minimum of five years recent experience in civilian courts at the time of appointment.

5.98 The committee considers that the bench of the Permanent Military Court should also include judges that have a knowledge and understanding of the military culture and context, in addition to civilian experience. The committee agrees with the proposition advanced by the JAG that Military Court judicial officers need to understand the military operational and administrative environment and the unique needs for maintaining discipline in a military force. The committee also considers that the presence of judges with military experience would strengthen the credibility and legitimacy of the Permanent Military Court within the Defence Forces. It may not be essential that all appointees have military experience, but the committee considers that the bench should include judges that have served in the armed forces and have an appreciation of the DFDA's institutional context.

5.99 The committee suggests that appointing experienced Reserve Legal Officers to the bench would ensure that judges possess an adequate degree of civilian and military experience. It is important to emphasise, however, that regardless of whether an individual has civilian legal experience alone, or possesses some degree of military experience, on appointment to the bench by the Governor-General, judges must be completely independent of the Defence Forces.

Recommendation 21

5.100 The committee recommends that the bench of the Permanent Military Court include judges whose experience combines both civilian legal and military practice.

5.101 The committee considers that reform is also needed to impart greater independence and impartiality into summary proceedings. Summary proceedings affect the highest proportion of military personnel. The current system for the

prosecution of summary offences, however, suffers from a greater lack of independence than Courts Martial and DFM processes.

5.102 The committee considers that Service personnel should have the right to access impartial and independent tribunals at all levels within the military justice system—the right should not be confined to 'serious' offences. All charges can potentially lead to a criminal record which could have a significant impact on the lives of Service personnel long after they leave the military. Where there is potential for a conviction to be recorded, all Australians should have the right to access impartial and independent tribunals for the determination of their guilt and innocence.

5.103 Creating a right to elect trial by Court Martial before the Permanent Military Court would ensure that a determination of guilt or innocence can be made by an independent and impartial tribunal.

Recommendation 22

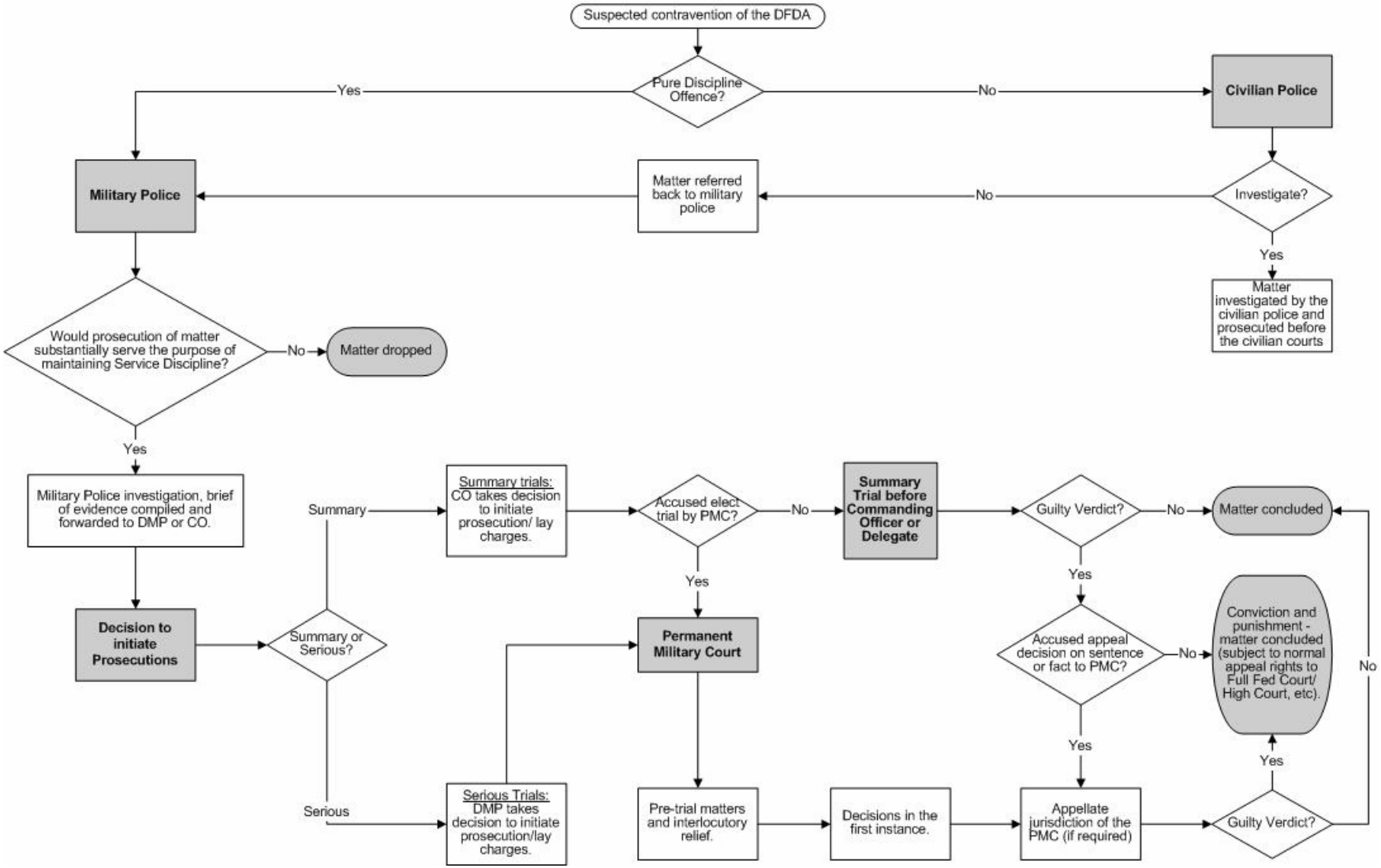
5.104 The committee recommends the introduction of a right to elect trial by court martial before the Permanent Military Court for summary offences.

5.105 Where a Service member elects to have their matter heard by the Commanding Officer, the committee considers that they should possess the right to appeal the Commanding Officer's decision to the Permanent Military Court, supplementing the right to elect trial by court martial, and further ensuring access to an independent court for the determination of guilt or innocence for all types of crime.

Recommendation 23

5.106 The committee recommends the introduction of a right of appeal from summary authorities to the Permanent Military Court.

Progress of Criminal/Discipline matters through proposed military justice system



Part 3

The Administrative System

The ADF uses the term 'military justice' in a broad sense. According to General Cosgrove:

> It covers disciplinary action under the Defence Force Discipline Act, including the investigation of offences. It also includes the conduct of administrative inquiries, adverse administrative action and the right to complain about such action. The military justice system, writ large, incorporates the laws, policies and processes under which military justice is administered.[93]

Senior Defence officers acknowledge that both the disciplinary and administrative components of the military justice system are 'essential to maintaining a disciplined and operationally effective military force'.[94] The systems, however, are quite distinct and separate. The administrative system has a different legislative source and serves a different purpose from the disciplinary system.[95]

Part 3 of this report examines the administrative component of the military justice system. It follows logically from and builds on Part 2 which dealt with the disciplinary system. It considers the following major components of the administrative system:

- the avenues and processes available to make a report of wrongdoing or to submit a complaint;
- the conduct of fact-finding administrative inquiries into issues such as safety, accidents, unacceptable or unprofessional behaviour and failures in command and control including
  - routine and investigating officer inquiries, and
  - boards of inquiry;
- the appeal and review processes open to people dissatisfied with the outcome of an administrative action including
  - the notice to show cause and redress of grievance, and
  - the IGADF and the Defence Force Ombudsman.

This Part concludes with a section on the offences and penalties under the military justice system.

---

93 *Committee Hansard*, 1 March 2004, pp. 4–5. See also definition found in *Defence Instructions (General) ADMIN 61-1*, Inspector-General of the Australian Defence Force—role functions and responsibilities, para. 10 (b).

94 Air Commodore Harvey, *Committee Hansard*, 1 March 2004, p. 54.

95 Department of Defence, *Submission P16*, p. 22 and *Submission P16F*, p. 3.

Chapter 6

The administrative system—an overview

6.1 The administrative system is primarily concerned with decisions and processes associated with the command and control, operations and administration of the Australian Defence Force.[1] The right to report a wrongdoing or to make a complaint is an integral part of the administrative system.

6.2 This chapter looks at the various avenues for reporting wrongdoing or making a complaint about unacceptable or inappropriate behaviour. It examines the opinions and experiences of those who have raised concerns about various aspects of the reporting processes available to ADF members.

Avenues for complaint

6.3 The ADF has a range of measures in place for reporting wrongdoing or inappropriate conduct so that the circumstances of a report can be investigated, the facts of the complaint determined and corrective action taken where appropriate. The diagram on the following pages sets out the various processes that may be taken to lodge a complaint. They range from the most informal of approaches to the more formal written complaint that initiates official procedures.

Self initiated resolution or alternative dispute resolution

6.4 The Defence Force encourages members to seek to resolve a problem at the lowest level of command. Initially, complainants are advised to rely on their initiative to rectify a situation by working with the other parties to the dispute or grievance to reach a resolution. If such an approach is not appropriate or does not produce a satisfactory result, the complainant is encouraged to obtain the support of a third person to work informally toward a resolution with the parties involved in the conflict.

6.5 For situations not amenable to this informal approach, the ADF promotes the use of alternative dispute resolutions involving mediation or conciliation as the most suitable next course. Supervisors or personnel in the chain of command are available to help resolve a problem. According to the Defence Equity Organisation, mediation can only be facilitated by an accredited mediator who has received formal training, and both parties must be willing to participate in the process.

---

1 *Committee Hansard*, 1 March 2004, pp. 5–6.

Figure 5.1—Options for resolution of unacceptable behaviour

OPTION	DESCRIPTION	ACTION
Self-Resolution by Complainant		
Self-Resolution	Complainant resolves the situation for themselves	Complainant to be provided with advice on how to approach the respondent. Using the "I" statement the complainant privately addresses their feelings with the respondent.
Supported Self-Resolution	Complainant resolves the situation for themselves with a third party there for support	Complainant may not feel comfortable in approaching the respondent without support of a third party. The third party does not speak on behalf of, or become involved in the discussion between complainant and respondent but is present for moral support. The respondent may also have a third party present.
Make a Complaint		
Submit a Complaint to a commander or manager	A **complaint of unacceptable behaviour** is the disclosure of any unacceptable behaviour to a commander or manager through any means: verbal, written or observed. (Any ADF member, Defence APS employee, Defence contracted staff or member of a foreign defence force can make a complaint)	Commander or manager to conduct a quick assessment to determine what has happened and then determine whether the matter can be resolved through informal means or if a formal inquiry is required. Refer DI(G) PERS 35-3 - *Management and Reporting of Unacceptable Behaviour*. **Informal Resolution** - After receiving a complaint, the commander or manager is to assess whether or not informal resolution is suitable (best for low-level issues where disciplinary or administrative action is not required). If appropriate, the commander or manager can recommend that the complainant try self-resolution. Alternatively, the commander or manager can informally counsel the people involved or conduct staff training. Another option is for the commander or manager to arrange Alternative Dispute Resolution (ADR), bearing in mind that participation is voluntary. Refer DI(G) PERS 34-4 – *Use and Management of Alternative Dispute Resolution in Defence.* Contact DADRCM by phoning 02 6265 2050. **Formal Resolution** – Conduct an inquiry. Following an inquiry, the commander or manager is to decide on the appropriate manner of resolution, which may be formal or informal. Refer to the *Administrative Inquiries Manual*, ADFP 06.1.4 or the *Defence Workplace Relations Manual*, DRB 19 for guidance.
Dissatisfaction with Complaint outcome	Submit a **Redress of Grievance** (ADF member) or a **Review of Actions** (Defence APS employee).	**Redress of Grievance** – ADF member lodges a written complaint through the chain of command. Refer DI(G) PERS 34-1 - *Redress of Grievance – Tri-Service Procedures.* **Review of Actions** - Defence APS employee lodges Review of Actions grievance to the Delegate. Refer *Defence Workplace Relations Manual*, DRB

OPTION	DESCRIPTION	ACTION
		19, Part 19, Chapter 1.
Whistleblower	A complaint is reported to the **Defence Whistleblower Scheme**	If a complainant is worried about victimisation, the Defence Whistleblower Scheme offers an alternative and independent process for reporting and investigating concerns. Contact can be made by phoning 1800 673 502.
Make a Complaint to an External body		
Commonwealth / Defence Force `Ombudsman	A complaint is lodged with the Ombudsman	The Ombudsman will encourage the use of internal options first. Refer DI(G) PERS 34-3 - *Inquiries by the Commonwealth Ombudsman and the Defence Force Ombudsman Affecting the Department of Defence and the Australian Defence Force*. Contact can be made by phoning 1300 362 072.
Human Rights and Equal Opportunity Commission (HREOC)	A complaint is lodged with HREOC	Person lodges a written complaint to HREOC. This is an alternative to submitting a complaint through the chain of command. HREOC may encourage the use of internal options first. Refer DI(G) PERS 34-2 - *Complaints of Discrimination and Harassment Through the Human Rights and Equal Opportunity Commission.* Contact can be made by phoning the central office on 1300 656 419 or the local state number.
Ministerial complaint	A complaint is lodged with the Minister.	A complaint can be forwarded to the Minister or the local Member of Parliament.
State/Territory Police or Courts	A complaint of sexual assault or any other harassment or discrimination complaint is reported to police or pursued through legal means.	Matter is addressed either directly to the police or through a legal adviser to be pursued through the civil court. **Sexual Assault:** Do not "counsel" for sexual assault. Refer immediately to Commanding Officer or senior Manager to initiate steps to notify police if the complainant requests. Refer to medical officer and to professional counsellor. Complainant's wishes should be taken into account and confidentiality appropriately observed. Refer DI(G) PERS 35-4 - *Management and Reporting of Sexual Offences*. **Other Unacceptable Behaviour:** In the case of some criminal matters, a complaint may be made to police. Civil litigation may also be an option in some cases.

Department of Defence, Defence Equity Organisation, Options for resolution, http://www.defence.gov.au/equity/ (11 March 2005)

6.6 Additional strategies to help members resolve complaints include new policies on the use of alternative dispute resolution practices and a directorate established in June 2001 to develop and assist in the adoption of these practices. According to Defence, these initiatives set high standards and allow the ADF to take a

lead in complaint resolution, resolving issues before they need to be referred to other Commonwealth bodies.[2]

6.7 The Directorate of Alternative Dispute Resolution and Conflict Management is responsible for facilitating the provision of dispute resolution services across the ADF.[3] It is developing a comprehensive training program designed to inform the Defence community about the benefits of using alternative conflict management processes and provides training in the necessary skills to employees, managers and practitioners in alternative dispute resolution.[4] Requests for access to the dispute resolution services are made through the Complaint Resolution Agency (CRA), the Defence Equity Organisation, Commands, commanders and line managers at all levels and personnel managers.[5]

6.8 The committee notes the work being done to encourage the use of alternative dispute resolutions. It did not explore in any depth this avenue of settling disputes during the course of the inquiry. The committee notes, however, that a number of the matters raised in submissions started as relatively minor disputes that escalated into major concerns as the administrative system seemed to compound difficulties rather than ameliorate them. The CRA noted that the most common matter raised in redress of grievance is 'general harassment as well as personality conflicts'.[6] Dispute resolution measures are an ideal mechanism for defusing these types of conflicts at an early stage and the ADF is right to include them in their range of options for managing unacceptable behaviour.

6.9 The committee urges the ADF to place a high priority on promoting and encouraging the use of alternative dispute resolution measures as a means of settling conflicts and resolving grievances at the unit level. It should ensure that there are sufficient well-qualified staff readily available to assist ADF members resolve conflicts.

Making a formal complaint

6.10 Where alternative dispute resolution is not feasible or has not achieved a satisfactory outcome, the Defence Force has a more formal approach whereby the complainant lodges a complaint officially. He or she may submit the complaint, which does not have to be in writing, to command, to manage and inquire into. The complainant may lodge a redress of grievance to his or her commanding officer where

---

2 *Committee Hansard*, 1 March 2004, pp. 5–6. See also Department of Defence, *Submission P16*, p. 10.

3 Department of Defence, *Submission P16*, p. 46.

4 See Noni Cadd, Helen Marks et al, 'Dealing with Conflict within the Military: An Evolving Model for Managing Conflict and Promoting Good Working Relationships Among Defence Employees', *Australasian Dispute Resolution Journal*, 2002, p. 146.

5 *Submission P16*, p. 46.

6 *Committee Hansard*, 2 August 2004, p. 31.

the member considers that he or she has a grievance concerning any matter relating to his or her service. This type of complaint must be lodged in writing. According to the Defence Equity Organisation, this option is suitable where the complainant has exhausted internal options or where the complaint has been investigated by the chain of command and the complainant is dissatisfied with the result.[7] The redress of grievance process when used as a means of seeking a review of a decision which adversely affects a member is discussed in full in chapter 10.

6.11 Although the ADF prefers that problems or difficulties be settled at the lowest level of command, the reporting system allows for complainants to raise their concerns outside the chain of command, for example through the Defence Force Ombudsman. The newly appointed Inspector-General of the Australian Defence Force may also receive complaints. The work of these two bodies is dealt with in chapter 11 as part of the committee's consideration of the appeal and review processes.

The importance of reporting wrongdoing

6.12 A sound and workable administrative system relies on mechanisms that encourage the exposure of impropriety, maladministration, inappropriate conduct, abuse, negligence or unsafe or dangerous work practices within an organisation. Effective reporting processes ensure that an organisation is made aware of shortcomings in the workplace and is well placed to rectify any impropriety and prevent accidents or mishaps. The following section looks at the strengths and weaknesses of the institutional arrangements in the ADF that are intended to facilitate the disclosure of wrongdoing or inappropriate or unacceptable conduct in the forces.

The effectiveness of the current reporting system

6.13 Confidence in the reporting procedures and a willingness to use them are central to the success of such mechanisms. Recent studies, however, suggest that a number of members do not avail themselves of the opportunities to report their concerns about improper conduct. There were a number of reasons for this: ignorance of process, a lack of belief in fair outcomes and a fear of reprisal. In 1999, the ANAO conducted an audit of the redress of grievance process in the ADF. It found:

> From ANAO's interviews with members, it was apparent that many were unaware of the ROG system or had only a limited understanding of it. Many of those who had made a complaint, or indeed read the relevant Defence Instruction, had difficulty understanding how to use the system. Others doubted that any ROG they submitted would be treated fairly. Some

7 See for example *Resolving Issues,* Equity and Diversity, http://www.defence.gov.au/equity/resolvingissues.htm (23 December 2004).

> were concerned about possible adverse treatment if they submitted an AROG against a decision of a superior officer.[8]

6.14 A survey conducted of experiences of unacceptable behaviour in the ADF released in February 2001 found that a small but significant proportion (14.6%) of junior sailors reported that they had been physically bullied, assaulted or threatened with violence at least once in the previous 12 months. Statistics also showed that 9.5% of SNCO's; 3.2% of junior officers and 2.4% of senior officers reported the same experience. For the Army, 29.1% of SNCOs and 18.6% of other ranks reported that they had been bullied, assaulted or threatened with violence, with a substantially smaller proportion of officers reporting the same experiences.[9] The Air Force data showed a smaller proportion of personnel experiencing physical assault. It is particularly important to note that:

> Less than a quarter of those that had experienced unwanted harassment sought the assistance of an equity advisor, chaplain or psychologist. Fewer still chose to make a formal complaint or to seek a redress of grievance. Respondents that took these actions were generally not satisfied with the results, with many indicating that they felt victimised as a result of their actions.[10]

6.15 The Survey went on to report that:

> The most common explanation [for not seeking assistance] was that the respondent took care of the problem themselves…Other common reasons were 'I did not think it was important' and 'I thought it would make my situation unpleasant'. Around one fifth of respondents of both genders took no action because they believed nothing would be done, a similar proportion were worried that they would be labelled a troublemaker if they pursued the issue.

---

8 Australian National Audit Office, *Redress of Grievances in the Australian Defence Force,* 1999 http://www.anao.gov.au/WebSite.nsf/Publications/4A245AE90015F69B4A256904001… p. 5 of 39. It should also be noted that in 1998, the Ombudsman found that: 'Despite the encouragement to ADF members to report incidents to their chain of command or to support services (who can then assist them in reporting the matter through the correct channels), my examination of a number of incidents involving sexual offences, harassment and/or discrimination indicates that victims do not, in the first instance, report the matter through official channels.' Commonwealth Ombudsman, *Own Motion investigation into how the Australian Defence Force responds to allegations of serious incidents and offences. Review of Practices and Procedures*, January 1998, para 8.65.

9 Directorate of Strategic Personnel Planning and Research, DSPPR Research Note 5/2000, *A Survey of Experiences of Unacceptable Behaviour in the Australian Defence Force,* February 2001, pp. 5–8.

10 Directorate of Strategic Personnel Planning and Research, DSPPR Research Note 5/2000, *A Survey of Experiences of Unacceptable Behaviour in the Australian Defence Force,* February 2001, p. v.

> Encouragingly, only 3.4% of males and 7.2% of females took no action because they thought that they would not be believed, and only 3.4% of males and 5.0% of females reported that they did not know what to do.[11]

3RAR—reporting of wrongdoing

6.16 Further evidence about the reluctance of members of the ADF to report wrongdoing came to light during inquiries into allegations about the use of illegal or informal discipline in 3RAR. In August 2000, the JSCFADT decided to examine the events alleged to have occurred in the battalion.[12] Two months later, in October 2000, the ADF announced it was establishing an inquiry into military discipline to be headed by retiring Federal Court judge, Justice James Burchett.

6.17 The Chief of the Defence Force (CDF) also held a stand-down period on 5 February 2001, at which each unit was addressed via video by the CDF and the relevant Service Chief.[13] This public demonstration was to announce to all Australians and ADF members that the 'highest standards of military justice and behaviour' were expected. It was also intended 'to assure all members of the ADF that the law is there for their protection, and that they should respect its procedures and come forward with any personal concerns'.[14]

6.18 In April 2001, the JSCFADT tabled its report on 3RAR. It determined from the evidence that extra-judicial procedures and illegal punishments were employed within 3RAR. It also found that there was 'a system in place that inhibited soldiers from speaking out in relation to the bashings'. Of interest to this committee is the joint committee's finding that:

> One of the most surprising aspects of the 3RAR allegations has been the reluctance of soldiers to speak out about what was happening. There is no direct evidence to suggest that the battalion headquarters staff were aware of what was happening. There is evidence that the unit padre was informed of some aspects of the events, but testimony by previous unit equity officers and doctors indicates that the allegations now being made about 3RAR

---

11 Directorate of Strategic Personnel Planning and Research, DSPPR Research Note 5/2000, *A Survey of Experiences of Unacceptable Behaviour in the Australian Defence Force,* February 2001, p. 24.

12 Media accounts of the allegations can be found in 'Bastardisation: Moore denies intervening', the *Canberra Times,* 17 August 2000; 'Losing Faith in "Old Faithful"', the *Courier-Mail,* 17 August 2000; 'Cosgrove's legal error draws fire, the *Age*, 17 August 2000.

13 Report into Military Justice in the Australian Defence Force, conducted by Mr J.C.S.Burchett, QC, An Investigating Officer appointed by the Chief of the Defence Force, under the Defence (Inquiry) Regulations 1985, p. 51.

14 See explanation of the military justice stand-down period in Media Release, The Hon. Danna Vale, MP, Minister Assisting the Minister for Defence, 'Government Response to the Report on *'Rough Justice? An Investigation into Allegations of Brutality in the Army's Parachute Battalion'*, No. MIN 203221/02, 22 March 2002.

> were not raised with them. This 'wall of silence' was maintained despite all key unit appointments having received briefings in ADF equity policy.[15]

6.19 The Burchett report, released in August 2001, gave added weight to the joint committee's findings. It found that four soldiers from 3RAR committed assaults in the guise of disciplinary measures and moreover that they were able to do so unchecked for a time.[16] It accepted that bastardisation practices had existed at some military institutions, and 'discipline by the fist' had been practised by some (perhaps only a few) in a number of units.[17] It was of the view that the events at 3RAR occurred during a period of two years which, if it had not already come to an end, apparently did so when police investigations began on 29 September 1998.[18]

6.20 According to the report, the first complaint in relation to 3RAR was that made by [Mrs K] in March 1998, alleging that her son had been assaulted and harassed whilst in Malaysia. Investigations were unable to find conclusive evidence of an assault.[19] That same year, the father of a 3RAR soldier had also complained that his son was ill-treated by members of the unit. The report notes that this complaint, which was not related to illicit disciplining, was not 'ultimately pursued'.[20]

6.21 Of significance to the committee was Burchett's observation that:

> …the fact that complaints may not always be made easily by the use of the avenues currently available, was amply demonstrated by the situation that developed in A Company 3RAR.[21]

6.22 The committee does not have any recent statistics available to gauge the current levels of bullying and harassment in the ADF, if any exists, nor to indicate the willingness or otherwise of persons to report such incidents. It does, however, have strong anecdotal evidence to suggest that there are pockets in the ADF where bullying and harassment have been tolerated and furthermore that there are still substantial obstacles preventing members from reporting such inappropriate behaviour.

---

15 Joint Standing Committee on Foreign Affairs, Defence and Trade, *Rough Justice? An Investigation into Allegations of Brutality in the Army's Parachute Battalion,* April 2001, p. 21.

16 Report into Military Justice in the Australian Defence Force, conducted by Mr J.C.S.Burchett, QC, An Investigating Officer appointed by the Chief of the Defence Force, under the Defence (Inquiry) Regulations 1985, p. 6.

17 Report into Military Justice in the Australian Defence Force, conducted by Mr J.C.S.Burchett, QC, An Investigating Officer appointed by the Chief of the Defence Force, under the Defence (Inquiry) Regulations 1985, pp. 7 and 57.

18 Report into Military Justice in the Australian Defence Force, conducted by Mr J.C.S.Burchett, QC, An Investigating Officer appointed by the Chief of the Defence Force, under the Defence (Inquiry) Regulations 1985, p. 55.

19 ibid., p. 63.

20 ibid.

21 ibid., p. 162.

School of Infantry, Singleton—reporting of wrongdoing

6.23 The committee now turns to the School of Infantry (SOI), Singleton, as an example of where the failure of the reporting system allowed bullying and discriminatory practices to continue unreported and apparently unknown to senior officers at Singleton. The committee received extensive evidence on these matters.

6.24 Much of the evidence came from the parents of young soldiers who experienced the worst aspects of this environment. In the most extreme cases those soldiers took their lives. The committee acknowledges that once a member enters the ADF, personal and family relationships are changed by this new professional environment. It also acknowledges that Defence must walk a fine line in the management of its engagement with family of personnel. The committee is concerned, however, that in case after case, worried and sometimes frightened parents felt that they had no other option but to contact the ADF directly about their concerns of mistreatment. In some instances, even this significant step was still not enough to move senior officers to act.

6.25 Between March and May 2000, a young soldier was subjected to inappropriate treatment while undergoing Initial Employment Trainees training at the School of Infantry (SOI), Singleton. Even though his parents alerted authorities to the conduct, such practices continued. The parents then contacted the minister's office in the hope that senior officers in Army Headquarters would be made aware of the problems. The parents informed the committee:

> Even with the minister's department involved our son was still billeted in the guardhouse and segregated from other EITs. It was for this continued inappropriate treatment that our son elected to discharge from the army in June 2000.[22]

6.26 In the later half of 2000, the allegations about bastardisation at 3 RAR spurred the parents of the young soldier at Singleton to press their concerns further. Mr Robert Amos, the father, stated:

> We then wrote to the minister officially requesting an investigation into events at SOI. This ensured that an official investigation would be conducted and the incident no longer swept under the table. At this point our concerns were that soldiers receiving this type of inappropriate treatment may not have had the close support our son did, this fear was later borne out.[23]

6.27 Although an investigation into this incident at SOI took place in 2001, the ill-treatment of young soldiers continued. A later inquiry in 2003 was to find practices of abuse at SOI similar to those that had been observed in the 2001 investigation. It

---

22 *Submission P6,* p. 1.

23 *Submission P6*, p. 1.

identified a culture at SOI where there was a widespread use of negative reinforcement to motivate recruits under training.

6.28 Mr Amos was not alone in raising concerns about the treatment of young soldiers around this time. Ms Avril Andrew explained that her son Scott had sustained an injury to his back and knee in October 2002 when undergoing his basic training at Kapooka. She told the committee:

> At first he was directed to ignore the pain and 'suck it in' and was not allowed to miss training even though he could barely walk, much less march. Finally it became impossible to cope with and he was sent to the Digger James Rehabilitation Unit (DJ's).[24]

6.29 In recounting her son's experiences, she stated that for young soldiers the Digger James Unit 'represented weakness of the worst possible kind—a message which was indoctrinated from day one'. She explained:

> When he was sent there his comment was that he had been sent to join the 'window lickers'. From the start he was unhappy at the stigma attached to being in the unit, as during their induction there were many references to people who were sent to DJ's being 'weak' and useless. When recruits marched past the DJ building they were given the 'eyes right' command and told to observe the 'window lickers' and other such derogatory remarks.[25]

6.30 Ms Andrew, whose son has been discharged from the Army and has been under constant psychiatric care, expressed her apprehension at the way in which the Services treat their recruits. She concluded:

> I accept that the army have a difficult job to do and that all personnel must be able to obey orders immediately, without question or hesitation, particularly in hostile circumstances. I do not agree that the way to achieve that is to break their spirit and then attempt to rebuild them as 'army'. Surely there is a better way?[26]

6.31 The committee agrees. Clearly, abuse and intimidation are not the way to develop responsible and well-disciplined ADF members. Indeed, it is the circumstances surrounding Private Jeremy Williams' suicide that highlighted the extent of harm that can result from the failure to stamp out incidents of harassment and abuse. They also exposed a serious lapse on the part of senior officers to learn explicitly from the investigation into the treatment of Private Amos and to implement the necessary changes to alter their own behaviour and procedures. This is a lesson for all ADF officers. Mr Amos explained:

---

24 *Submission P21*, p. 1. Scott left the Army in January 2004. See also Mr and Mrs Hayward, *Submission P66*.

25 *Submission P21*, p. 1.

26 *Submission P21*, p. 5.

> Senior-staff at SOI assured us that they had fixed the problem they even went as far as to invite me down to inspect the changes they had made, an invitation I now wish I had accepted. This was backed up by the investigation report covering letter that claimed that the report's recommendations had been implemented. We accepted their word in the firm belief that Orders and Instructions contained in reports are to be acted upon…however it has since been admitted by the army that the recommendations had not been implemented.[27]

6.32 With the findings of the joint committee, the Burchett Report and the investigation into the treatment of Private Amos at SOI still fresh, allegations were raised in early 2003 that young Recuperation & Discharge (R&D) Platoon soldiers at Singleton were being subjected to:

> …abuse, denigration, harassment, bullying (including threats of physical violence)…by staff and other Initial Employment Trainees (IETs); plus the absence of efficient and effective support services or mechanisms where these soldiers could seek redress beyond their NCOs for a wide range of problems they were encountering…[28]

6.33 Yet despite warnings, no one in the ADF took action. Jeremy committed suicide by hanging at the SOI, Singleton, on 2 February 2003. According to his parents, in the week prior to his death they became increasingly aware of his traumatised, distressed and anguished state. Jeremy told them that he 'was made to feel worthless, useless, scum and shameful because he was injured and had been transferred to R&D Platoon'.[29] His sister recalled the events leading to his suicide:

> On the morning of 29 January my father rang Singleton and spoke to a sergeant at the base. He rang because he was deeply concerned about Jeremy's general state. That night before this phone call Jeremy had been in tears on the phone to my parents and he was convinced that his career with the Army was over. My father's call the next day was the Army's chance to save Jeremy, but the importance of his warning was not heeded. The Army took a flippant approach to this warning and they failed in their duty of care. Furthermore, assurances given to my father that this call be kept confidential were broken. Someone at the base told Jeremy of that phone call, and he said to my parents that evening, 'I was told my parents rang the Army,' and he was angry and inconsolable over this. After his death, the investigating officer was not able or was unwilling to find out who had breached my father's confidence, who told Jeremy of that phone call and why that crucial warning that could have saved his life was not properly heeded.[30]

---

27 *Submission P6,* p. 2.

28 Mr and Mrs Williams, *Submission P17*, p. 2.

29 *Submission P17*, p. 1.

30 *Committee Hansard,* 28 April 2004, p. 37.

6.34 Even following this death, Army chose to ignore what were now clearly endemic problems at SOI until Jeremy's parents, after repeated attempts, were successful in pushing for a thorough inquiry into conditions at SOI. At the time of their son's death, they were assured by the Commanding Officer of the Infantry School that their concerns about the alleged abuse were groundless and that the base was run professionally. They told the committee:

> Had we taken this officer at his word we would simply have walked away and nothing would have been done about the situation at Singleton or indeed within the Army; and how many more young men would have suffered the same fate, not including the two deaths (that we know about) subsequent to Jeremy.[31]

6.35 The Executive Summary of the Investigating Officer's Report into the Death of Private Williams found:

> …a widespread use of negative reinforcement to motivate recruits under training. This includes disparaging and negative comments about Weary Dunlop and Digger James Pls (discharge and rehab/remedial training respectively). While the intentions of staff are commendable, in many cases they are using the wrong methods to achieve their aims…
>
> The allegation of a culture of denigration is not proved, however, it is believed that there is a culture of negativity towards Weary Dunlop and Digger James Pls.

6.36 It went on to find:

> There is a strong negative feeling among both staff and IETs against some IETs who are getting discharged and those IETs who are perceived as using injury or failure as a way to avoid hard training. At the time PTE Williams was at SOI, most of these IETs were located in R&D P1, along with all other injured IETs. There is also a perception that many of those in the P1 are 'weak'. As a consequence, all members of the P1 were subjected to widespread denigration and harassment from both staff and IETs still in training.

6.37 It also found the use of extremely offensive language common at SOI.[32]

6.38 The full report, which remains a confidential document, gave a more complete picture. It found:

> A culture of denigration and harassment existed towards R&D P1 at the time PTE Williams was present in the P1. As a result, members of the P1 were not treated with dignity, respect and sympathy.

---

31 *Submission P17*, pp. 2–3.

32 Executive Summary, Investigating officer's Report into the Death of 8299931 PTE Jeremy Paul Williams formerly RAINF Initial Employment Trainee School of Infantry, Singleton on 2 February 2003, pp. 3, 4.

6.39 It identified the following factors that contributed to this culture:

- an almost universal negativity by both staff and trainees towards those who are perceived by them to be using injury or failure as a means of avoiding hard training. This perception was then regularly applied to all members of the platoon;
- a strong negative opinion by both staff and trainees directed at a minority in R&D P1 who had psychologically discharged themselves from the Army pending their formal discharge;
- the widespread denigration of R&D P1 by junior staff;
- the widespread denigration of R&D P1 by IETs in training. It is believed that this practice is encouraged by their own views as well by the views of staff; and
- a lack of knowledge of this culture by the senior members of the chain of command.[33]

The report noted that 'while denigration of R&D was not universal among junior staff, there was no evidence of steps being taken to stop this culture'. [34]

6.40 Although the report found no evidence to support the view that a culture of brutality, bullying and stand-over tactics existed at SOI, it noted that the incidents reported, 'seem to be isolated incidents from differing individuals that highlight inappropriate behaviour by individuals rather than a culture.' It went on to state that there is evidence that a small number of staff members do use the threat of violence and some may have used physical violence on IETs. Furthermore, it found that 'cases of violence between IETs have been widely reported and are considered to exist'.[35]

6.41 The report noted that, at the time of writing, 'a culture of denigration and harassment of R&D P1 was not apparent'.[36] It should be noted that the earlier 2001 report reached the same conclusions, yet two years later the abuse was still occurring.

6.42 Indeed, the investigating officer's report referred to the 2001 investigation into the alleged mistreatment of another private at SOI in 2000. Importantly, it observed that the earlier report had identified a culture at SOI with distinct similarities to that

---

33 Annex A, Appointing Officer's Decisions and Action Plan Investigation into the Death of 8299931 PTE J.P.Williams, February 2003, pp. 35–6. This document was provided to the committee and is classified as Staff-in-Confidence. The committee has taken great care to ensure that the privacy of any persons referred to in the report has been respected.

34 Annex A, Appointing Officer's Decisions and Action Plan Investigation into the Death of 8299931 PTE J.P.Williams, February 2003, p. 36.

35 Annex A, Appointing Officer's Decisions and Action Plan Investigation into the Death of 8299931 PTE J.P.Williams, February 2003, p. 53.

36 Annex A, Appointing Officer's Decisions and Action Plan Investigation into the Death of 8299931 PTE J.P.Williams, February 2003, p. 37.

described two years on in the later report. The earlier report had accepted that as a result of changes in 2000/01, there was a far more professional and positive attitude at SOI. The later report surmised:

> Either the changes and remedial action identified in 2001 were not followed through by the chain of command in 2001, or they were lost in the space of a single posting cycle.[37]

6.43 With regard to the investigation into the death of Jeremy Williams, Major General Gordon, in his Appointing Officer's decision document stated:

> One of the most important matters that has come from the Investigation is the need for an enduring solution to the existence or re-emergence of a culture of denigration and harassment especially towards injured soldiers and towards soldiers who are not able to continue training (at the School of Infantry). This problem was severe at the time that Private Williams took his life and has previously been evident. The problem has existed in a milder form at the Army Recruit Training Centre.[38]

6.44 On 14 April 2003, Gunner John Satatas committed suicide at A Battery (A Bty) 4 Field Regiment Holsworthy. He had recently completed his IET at the School of Artillery (SOA). He had also spent six months in R&D Pl from February to August 2002. The Investigating officer's report into his death refers to the findings of the report into Jeremy Williams' death and concluded from an analysis of the evidence that 'the same culture of denigration and harassment existed during the period of Gunner Satatas's attendance at SOI and specifically in R&D P1'.[39]

Conclusion

6.45 Based on the findings of the investigations into the treatment of Private Amos, Private Williams and Gunner Satatas, it is beyond doubt that between March 2000 and February 2003 there were serious problems at SOI which were not addressed by senior officers.

6.46 The Burchett report noted the critical importance of a recruit's first experiences of the military and of discipline and its role in 'forming the character of those who make up the Defence Force and their ideas about their duties to which they are bound'. In its view, 'The plain conclusion is that the respect for discipline of a

---

37 Executive Summary, Investigating officer's Report into the Death of 8299931 PTE Jeremy Paul Williams formerly RAINF Initial Employment Trainee School of Infantry, Singleton, on 2 February 2003, p. 7.

38 Appointing Officer's Decision Document—Investigation into the Death of 8299931 Private J.P.Williams, February 2003, 29 July 2003. He made a number of recommendations.

39 Investigating Officer's Report into the Death of 8237572 Gunner John Konstantinos Satatas, Former RAA Soldier A Battery 4 Field Regiment, Holsworthy, New South Wales on 14 April 2003, pp. 22, 23.

member of the ADF grows in some measure from the Recruit Training School.'[40] The committee agrees with this assessment which makes the incidents at SOI all the more disturbing.

6.47 It is clear that there is something wrong with a reporting system that failed to expose this type of improper conduct. Young men chose to remain silent about abusive behaviour; seriously concerned parents raised concerns which were not acted upon; and, more importantly, members of the ADF in command positions were either blind to, or ignored warning signs.

6.48 The following chapters seek to examine the reasons that allowed these situations to develop and to continue unchecked.

40 Report into Military Justice in the Australian Defence Force, conducted by Mr J.C.S.Burchett, QC, An Investigating Officer appointed by the Chief of the Defence force, under the Defence (Inquiry) Regulations 1985, pp. 9, 75.

Chapter 7

The reporting of wrongdoing in the ADF

7.1 There are many avenues available to a member of the ADF to register a complaint including the redress of grievance system, the divisional system, chaplains, equity officers, the equity 'hotline' and the Defence Force Ombudsman. Yet there is no doubt that some members remain unwilling to use the system. The committee draws particular attention to the number of cases mentioned in the previous chapter where the parents of ADF members resorted to taking up their son or daughter's concerns with command or even with the Minister. As indicated in the previous chapter, such action is not taken lightly by the parents of service personnel. That it needs to and does happen and that the results have included the deaths of soldiers clearly is a serious indictment of the reporting system or the oversight by senior Defence personnel or both.

7.2 The committee has considered in detail the conditions at SOI, Singleton, against the backdrop of the 3RAR investigations, to highlight the potential for abuse to go unreported and, apparently, undetected. Evidence received by the committee suggests that this problem of unreported bullying and harassment may be found in different parts of the ADF.[1]

7.3 The failure to expose such abuse means that the administrative system stumbles at its most elementary stage—the reporting of wrongdoing. It does not provide a reporting structure that encourages the disclosure of impropriety or poor work practices which means that unacceptable behaviour is allowed to take root.

7.4 Witnesses appearing before this committee who have been the victims of abuse or are relatives of people who have suffered ill-treatment recount an all too familiar story about the unwillingness to report wrongdoing. The very fact that the two young soldiers (Amos and Williams) at Singleton were not prepared to pursue their right to make a complaint and that impropriety came to light through the determined efforts of their parents speaks volumes about the inadequacies of the administrative system at Singleton.

7.5 The committee is concerned that evidence it has received about the failure to disclose poor or dangerous work practices or unacceptable behaviour appears to affect many aspects of life in the ADF. The findings of a number of administrative inquiries have identified behaviour that could potentially endanger members' lives but which

---

1 Ms Avril Andrew, *Submission P21*; Confidential *Submission C19*; Confidential *Submission C28*.

had gone unreported until an investigation following an incident exposed a history of negligence, unsafe work practices, or other risky or improper behaviour.[2]

7.6 The committee has considered the evidence presented to it during the inquiry and the findings of previous inquiries into abusive and intimidating behaviour in the ADF over recent years. Also, on 11 and 12 November 2004, a number of reports appeared in the media about Australian soldiers dressed up as members of the Klu Klux Klan and other related allegations of racial abuse. The committee wrote to the Minister for Defence inviting him to make a written submission on the facts and circumstances surrounding this incident at Lavarack Barracks, or any similar type of activity, and on the steps taken to address the problem.[3]

7.7 The Minister declined the invitation on the grounds that the incident and related allegations of racial abuse were under investigation and the findings and decisions arising from them would not be finalised before 17 March 2005.[4] This was the date that the committee was expected to table its report.

7.8 During Estimates hearings on 31 May 2005, members of the Senate Foreign Affairs, Defence and Trade Legislation Committee asked for further information on the alleged offences at Lavarack Barracks. The CDF told the committee that the Chief of Army was concerned that there may have been 'procedural shortcomings in an investigation in 2003 and that the investigation might have lacked thoroughness'. The Chief of Army directed that a 'new and comprehensive' investigation be undertaken. The CDF explained that:

> It has now been completed to determine the circumstances of the photograph and the subsequent actions taken by the chain of command. The final report has been cleared by the Defence Legal Service and submitted to the Deputy Chief of Army. He has considered the findings and recommendations of the final report. He has decided on a range of disciplinary and administrative actions against individuals who were in the unit at the time. The soldiers who were subjected to racial name-calling will receive an apology from the Army and will be offered counselling support. The Deputy Chief of Army is also recommending improvements to the preparation of investigation officers and a follow-up examination of the unit to determine if the unacceptable behaviour is still being practised. A directive will be developed to implement the Deputy Chief of Army's decisions and this formal action is being taken now to demonstrate Army's

---

2 Apart from the abuses at SOI, other notable inquiries that exposed unsafe or dangerous practices involve those inquiring into the accident that led to the death of Jason Sturgess (poor vehicle maintenance), the incident that led to the death of Seaman Gurr (consuming alcohol against rules) and the F-111 (Fuel Tank) Deseal/Reseal and Spray Seal Programs. See Chapter 12.

3 Correspondence, the Chair, Senate Foreign Affairs, Defence and Trade References Committee to the Minister for Defence, 2 December 2004.

4 Correspondence, Senator the Hon Robert Hill to the Chair, Senate Foreign Affairs, Defence and Trade References Committee, 22 December 2004.

> determination to eliminate discriminating behaviour and to support those who need the protection and support of their leaders.[5]

7.9 The committee notes that Army has taken steps to remedy the problem at Lavarack Barracks. It is concerned, however, that again an initial investigation into serious allegations of misconduct proved inadequate and that a second investigation was undertaken only after the alleged events had attracted widespread public attention. Furthermore, it took a second investigation to compensate for the failings of the first and to get Army to take decisive measures to correct the problem.

7.10 The committee understands that the ADF has taken steps to address the broader problems associated with reporting and preventing unacceptable conduct or work practices. These include initiatives such as the Fair Go Hotline, the handy 'seek help' card and the establishment of the Directorate of Personnel Operations to provide strategic direction and advice and to coordinate action with regard to sensitive personnel issues. Army has also developed a specific campaign for the safety and welfare of trainees which includes a code of conduct that governs the treatment of trainees and promotes the desire for all trainees to be successful in training.

7.11 More specifically in the case of Jeremy Williams, Lieutenant General Leahy acknowledged that organisational failures, unacceptable conduct and negative attitudes of staff and trainees towards other trainees contributed to a sense of despair and depression in Private Williams. He further acknowledged that the investigation revealed that there had been a failure to act on recommendations from a similar incident at the School of Infantry some years before. In his view, it 'became patently apparent that the Army needed to take action to tighten up and formalise mechanisms for tracking and ensuring that recommendations are acted on and followed through'. He stated:

> We have created separate rehabilitation and transfer centres to improve the rehabilitation of our soldiers who are injured in training and to improve the support that soldiers who are unable to continue training receive. We have developed a new course for instructors to improve instructor performance and to enhance equity training for all instructors. We have put in place a system of external audits to allow soldiers to report anonymously on their treatment during training. We have increased staffing levels and the supervision of staff as well as reducing instructor-trainee ratios to better manage the welfare and performance of both instructors and trainees. We have taken administrative action against members in the School of Infantry chain of command who allowed unacceptable behaviour to go on and, so far, we have charged two noncommissioned officers under the Defence Force Discipline Act. One charge has been heard; another charge will be heard in April. I see both of these as a normal functioning of the military justice system.

---

5 Senate Foreign Affairs, Defence and Trade Legislation Committee, *Hansard* , 31 May 2005, p. 70.

> We have expanded the medical and psychological support to all training establishments, including a full-time doctor and a full-time psychologist at the School of Infantry. We now formally advise all trainees on arrival of the range of support and counselling services available at their particular training school. We have established formal protocols to improve and streamline processes appropriate to Army circumstances in the case of suicide or accidental death during any military activity. To ease, in part, the pain of families involved, the Army has commenced the practice of providing an officer dedicated as the single point of contact for a deceased member's family should they desire this. That officer will explain the inquiry process to the family, carry forward any concerns they may have and fold these concerns into the inquiry terms of reference. As a conduit for communications, the officer's role is to provide regular updates to families on the progress of the inquiry and any action taken as a result of it.[6]

7.12 The Committee commends the actions taken by the ADF to remedy the deficiencies that the investigation into Private Williams' death so clearly identified. The committee is concerned, however, that certain behaviour associated with discrimination, bullying and harassment may recur in the ADF. This concern is heightened by evidence before the committee that shows ADF's slow response to incidents at SOI and Lavarack Barracks and further that initial investigations proved ineffective in having immediate and necessary corrective action taken.

7.13 The Committee believes that in order to minimise the likelihood of a recurrence, the ADF needs to have an effective mechanism that would encourage the early reporting of any concerns about improper conduct or poor work practices. Such a system would enable prompt and sure action to be taken to address and remove any form of abuse or inappropriate behaviour before it takes hold.

7.14 It now examines the main features of the reporting system to identify the obstacles holding people back from reporting wrongdoings. Further, the committee seeks to ascertain whether ADF members who have genuine grievances or are aware of inappropriate behaviour and wish to report their concerns are well served by the current system. The evidence is based on experiences that go beyond those at Singleton and reflect a wider picture of the ADF. They include the following matters:

- conflicts of interest in using the chain of command;
- the military culture and its influence on reporting wrongdoing;
- institutional blind spots;
- reprisals and the reporting of wrongdoing;
- members' awareness of and confidence in using the current avenues available for reporting wrongdoing; and
- avenues for reporting wrongdoing.

---

6 *Committee Hansard*, 1 March 2004, p. 33.

Reasons for failing to report wrongdoing or failing to make a complaint

7.15 One of the most frequently cited impediments to reporting a wrongdoing or making a complaint is the lack of trust and confidence in a system that seems riddled with conflicts of interest.

Conflicts of interest in using chain of command

7.16 As mentioned earlier, the ADF requires its members to seek to resolve a complaint at the lowest possible level through the normal command channels and administrative arrangements. Defence Instructions are clear on this matter:

> Persons who wish to report suspected misconduct should normally raise these concerns through their chain of command or line management. Commanders and managers in Defence have a responsibility to develop and support a working environment in which staff have the confidence to make such reports.[7]

7.17 Although a long-accepted practice, this process of reporting a wrongdoing or lodging a complaint with a member's commanding officer is in itself a major drawback for some members seeking help. Mrs Madonna Palmer, whose son Damien committed suicide in August 1999 soon after he graduated from basic training, and who allegedly had been humiliated and demoralised because of his aboriginality, articulated this problem in the most effective manner:

> I think there should be someone separate who these young kids can go to—not only Aboriginals; I mean anybody. It is too in-house; everybody knows everybody or they have been through training with somebody years ago and know their bosses. If you do have a problem you need to go to someone, even off base or somewhere where they can go separately that is not connected with Defence.[8]

7.18 From personal experience, Mr Neil Howard informed the committee that he had knowledge of the use of illegal substances in the ADF and explained that:

> There were instances where the need arose to report an incident and subsequently discovered that the personnel to whom I would report was in fact the instigator of the incident.[9]

7.19 Mr David Down, who claims he was subjected to physical abuse while serving in the Navy, voiced similar concerns:

> The reporting of incidents is through the chain of command, to people who are of similar rank and usually mates with the perpetrators and is not

---

7 Defence Instructions (General), PERS 45–5, *Defence Whistleblower Scheme.* See also Defence Instructions (General), PERS 35–3, *Management and Reporting of Unacceptable Behaviour,* para. 43.

8 *Committee Hansard*, 1 March 2004, p. 92.

9 *Submission P54*, p. 1.

> recorded adequately if at all. The navy's point of view is that if nobody saw, it did not happen.[10]

7.20 To the same effect, one witness felt he could not go to his OC with a complaint of bullying and harassment against the CO because his OC had a close relationship with the CO. After considering other options, he felt there was no one to turn to and that Defence Instructions offered no guidance. He recommended that they be rewritten to ensure that clear guidance is provided for situations where the CO or other high ranking officers are involved in the complaint.[11] Further, he believed that an independent civilian investigation agency with a helpdesk function should be available to provide support to staff who feel they have a grievance.

Culture of silence

7.21 The prevailing cultural environment of a workplace has a powerful influence on the preparedness of an employee to report concerns about wrongdoing. Even where there are formal and known avenues for a person to disclose information about inappropriate conduct, workplace forces may effectively render them useless.

7.22 The Burchett Report went into some detail about the military culture in which each member is highly reliant on the skill and dedication of other members that tends to engender strong peer group discipline. The JSCFADT made similar observations about the unique demands placed on those serving in the ADF which sets a heavy value on dependable and trustworthy mates.[12]

7.23 Evidence before this committee reinforces the above findings. On occasion, however, the values of loyalty, trustworthiness and solidarity can take on a form that has little tolerance for individual difference or perceived vulnerability. The reported instances of abuse at Singleton were a manifestation of this culture in the guise of weeding out the weak from the strong. Improper conduct—belittling, personal denigration, bullying, ganging up, ostracism from the group on the one hand, and the specific targeting of an individual for humiliation on the other—are indications that the culture of denigration and harassment had emerged in concert with the culture of silence. This culture of harassment and silence was not confined to Singleton.

7.24 Indeed, a number of witnesses described an environment in the ADF where one was expected to be strong, stoic and uncomplaining in the face of pain or

---

10 *Submission P61*, p. 4. His experiences go back to the late 1970s but nonetheless highlights the problems that are created with reporting wrongdoing within the chain of command.

11 Confidential *Submission C43*, paras 22 and 23. Also *Submission*s *C29* and *C51*.

12 Paras 2.20–2.22.

emotional stress. Any sign of weakness invited abuse or denigration.[13] One soldier recounted his experiences:

> Even when soldiers were performing correctly they would be degraded as being too slow etc, anything to fuel abuse. There would be excessive swearing and verbal putdowns. Soldiers continually reminded of how pathetic or useless they were, how they were the worst of the worst and that they were scum etc. Eventually nerves would see some mistakes and be threatened with punishment. Charges, extra duties or thrashings were the normal threats. Threats of physical violence were not uncommon. Sergeants in particular would make a habit of reinforcing how they could, and would make your life hell.[14]

7.25 A serving Army psychologist attributed this type of conduct to Army's 'cult of endurance'. He explained:

> The easiest way to make a judgment about ability to endure is to reward the fit and strong, and vilify the unfit, unskilled, and unable. This does not make allowances for the temporarily sick and injured, but it is a straightforward way of separating who has the ability to endure from those that do not…[15]

7.26 Indeed, this prevailing culture appeared to be one of the most pernicious influences holding members back from disclosing wrongdoing or pursuing a complaint. The evidence before this committee suggests that the pressure to endure in silence has a long established history.

7.27 Picking up on this theme, Mrs Williams told the committee that soldiers at Singleton would not seek help from the social worker because it was seen as a weakness.[16] Their situation was made even more difficult because they again must work through the chain of command to make an appointment. As Mrs Williams explained:

> If they want to see anybody, they have to sneak out behind closed doors in order to do it. The only way that they can formally go and see the social worker or the padre is to actually apply through their NCO. If you are a soldier and you go up to your NCO and say, 'Can I go and see the psychologist? I've got a problem,' what do you think is going to happen?
>
> …These soldiers have told us categorically and unequivocally that they will not use those sorts of channels. They will not go to their corporal or their

---

13 Ms Avril Andrew provides examples of this type of behaviour. *Submission P21*. Also Confidential *Submission C19*. The author of confidential *Submission C35* was a soldier who recalls a time when he was suffering from a leg injury but was forced to endure long periods of standing on parade, being subjected to oral abuse and told to 'harden up'.

14 Confidential *Submission C19*.

15 Confidential *Submission C30*, p. 8.

16 *Committee Hansard*, 28 April 2004, pp. 59–60.

> sergeant simply because of the denigration and the browbeating they will get. It is seen as a form of weakness and they are treated in that manner.[17]

7.28 One witness, who had reported his suspicions about drug use in his unit, told the committee:

> I found a dangerous myopic attitude held by some, that 'loyalty to your mates' is in essence, above all else, and reporting on your mates is equivalent to committing a serious crime, even if it involves doing the right thing and reporting drug users.[18]

7.29 Not only does the military culture discourage individuals from reporting wrongdoing, it also exerts influence over the preparedness of the institution to accept or expose wrongdoing. The ADF is not alone in this regard. Organisations, public and private, are also known to fail to act on reports of wrongdoing and to discourage such reporting simply by failing to recognise that reporting impropriety is a 'positive and constructive force'.[19]

Downplaying or dismissing complaint

7.30 The committee has received evidence that suggests that although the military culture fosters a strong sense of solidarity and loyalty, it also has the potential to create blind spots in the institution and its members particularly among higher ranking officers.[20]

7.31 The Defence Force Ombudsman made the observation that the office had received several complaints where 'it appears Defence has had considerable difficulty in entertaining the notion of investigating a complaint in the first instance despite very clear concerns being expressed both by the individuals involved, as well as by other people in relatively senior positions in the ADF'. He observed:

> It is axiomatic that if a complaint is not accepted as a complaint, it cannot be resolved.[21]

7.32 Mr David Hartshorn wanted to report an alleged hit and run accident that he had witnessed while on duty overseas involving ADF personnel. He explained to the committee that he was talked out of pursuing a redress of grievance by the appointed investigating officer who said he was 'an extremely busy man and that I was wasting the Army's time.'[22] On a second occasion, he was again persuaded not to proceed with

---

17 *Committee Hansard*, 28 April 2004, pp. 59–60.

18 Confidential *Submission C7*, p. 1.

19 Public Concern at Work, OECD Labour/Management Programme, http:www.pcaw.co.uk/policy_pub/oecdreport.html (14 September 2001).

20 See for example, Mr Satatas, *Committee Hansard*, 28 April 2004, p. 6 and Peter Gerrey, *Submission P7*.

21 *Submission P28*, p. [3].

22 *Submission P52*, p. 1.

his complaint by an Army Legal Officer, who said, there were 'no legal grounds to pursue the redress of grievance as it did not have anything to do with my service…'[23] Another person, subjected to unacceptable and bullying behaviour, informed the committee that she was told 'to accept it and move on'.[24]

7.33 Mr and Mrs Amos informed the committee that they had contacted senior officers at the SOI at Singleton and advised them about their son who, in their opinion, was being subjected to 'inappropriate treatment'. According to Mr and Mrs Amos:

> Telephone discussions with senior officers at SOI advising them of what was going on in their command were ignored and failed to bring about change in the treatment of soldiers, their rights to appropriate treatment or the right to normal soldier management procedures while in SOI's care, in this case the right to apply for corps transfer, a right both our son and other IET soldiers were denied.[25]

7.34 Along similar lines, Mr Richard Satatas, the brother of a young soldier who had committed suicide at Holsworthy, had been told by a Major that the allegations of mistreatment, including bullying, raised by his brother, had been looked into but officers decided that no action was needed because:

> basically, they felt that it was just horseplay…and that things like this happened with so many boys all living together on the same base—a bit of tension builds up.'[26]

7.35 To the same effect, Ms Williams told the committee that the Army took a 'flippant approach' to their warnings and it failed in its duty of care. Furthermore, assurances given that her father's call about Jeremy's welfare would be kept confidential were broken.[27] Mr Williams concluded:

> I point out to the Senate committee that, when we attempted to lay at the feet of the commanding officer at Singleton over a year ago all the problems he had on that base, he basically shooed us away. He told us that our concerns were baseless and that his base was professionally run.[28]

7.36 He added:

> What provoked our concern and our desire for an investigation was the appalling situation at Singleton that came to light in the two days that we were on that base—in particular, the interaction we had with the young

---

23 ibid., p. 1.

24 Confidential *Submission C28*. The author of Confidential *Submission C29* stated that those in his chain of command were indifferent to his allegations.

25 *Submission P6*, p. 1.

26 *Committee Hansard*, 28 April 2004, p. 5.

27 *Committee Hansard*, 28 April 2004, pp. 35–8.

28 *Committee Hansard*, 28 April 2004, p. 60.

> soldiers of the R&D Platoon of which Jeremy was a member. Clearly things were very seriously amiss at Singleton and in that platoon. There was a culture of denigration and abuse. It was very easy for us to put together a picture of why Jeremy had despaired to the extent that he did. From there we commenced our efforts to bring about some form of inquiry and ventilation of the system at Singleton. We actually voiced our concerns at a final meeting with Roney in his office on the Wednesday afternoon. His response was that there was nothing wrong on his base and that it was professionally run.[29]

7.37 This tendency to overlook or make light of a complaint is not necessarily borne of bad intentions. Mr David Down expressed the view that one of the main problems with the military justice system was that it was run by military personnel and 'their pride in the forces makes it difficult for them to accept that some things actually go on.'[30]

7.38 So much of the evidence received repeatedly shows that the culture of the ADF seems to encourage an approach that downplays, dismisses or ignores the existence of inappropriate conduct. The committee believes that it is important for ADF members to accept that the ADF is protective of itself as an institution and that the ADF must ensure that safeguards are in place to counter balance this tendency to protect the institution. Independence and impartiality on the part of those responsible for receiving complaints or reports of wrongdoing must be part of the solution.

Threats of reprisals or fear of 'getting into trouble'

7.39 If members are to report alleged wrongdoing or complain about improper conduct, they must be confident that they will be protected from reprisals for doing so. Defence Force Regulations stipulate clearly that a member is guilty of an offence if he or she prevents or dissuades another from making a complaint or causes another member to be 'victimised, penalised or prejudiced in any way for making a complaint'.[31] A number of witnesses, however, recalled their fear of recrimination should they make a complaint. It would seem that the message at the official level has not found its way into common acceptance.[32]

7.40 Mrs Jayne Fitzpatrick, who was pursuing action against an RSM for allegedly defaming her husband, stated that when she refused to drop the complaint she was told

---

29 *Committee Hansard,* 28 April 2004, p. 41.

30 *Submission P61*, p. 4.

31 Regulation 80, Defence Force Regulations 1952.

32 See for example, Ms Avril Andrew, *Submission P21*, p. 5; Ms Jayne Fitzpatrick, *Submission P35*; Confidential *Submission C42*, p. 4; Ms Knight, *Submission P18*, p. 2 Mr Southam claims that he was mistreated after he submitted a redress of grievance making allegations of mistreatment, *Submission P19*, p. 4. Although Mr Lloyd Richards' account of racism, harassment, intimidation and lack of support goes back to 1988, it provides an insight into the type of activity that can be tolerated in certain pockets of the Defence Force. *Submission P36.*

by an ADF member that her husband would be court martialled or handed over to state or federal police. She understood these comments to be threats.[33]

7.41 One ADF member, who alleged that he suffered serious reprisals for reporting the use of illegal drugs in his unit, told the committee:

> Soldiers simply did not speak up to anyone through fear of repercussion should it be discovered. I discussed some problems with the barracks padre but was too scared to discuss our overall treatment. To speak up about anything was a definite no-no; we were made well aware of that via threats to us and our families.[34]

7.42 Another member, claiming that he was bastardised, exploited, abused, harassed and physically tormented as part of his training, and, as a consequence, has suffered a 'complete mental breakdown', stated:

> …you will never get serving soldiers to fully comment on wrongdoings. Whether you speak to them privately, away from their Sergeants and Lieutenants it does not matter, the fear of repercussions should they discover you have spoken up, something that has an uncanny knack of occurring in the Army, is far too great.[35]

7.43 In referring to approaches such as 'open door policies', he maintained that while they look good on paper and sound good in theory:

> …speaking from one who has experienced life from the inside, they are bound to fail and provide nothing to grieving or abused soldiers. Had I known that I had the power to go above my direct superiors and straight to a commanding officer's door I still would have chosen not to. As mentioned, the fear of repercussion is simply too great.[36]

7.44 Mr Williams recounted an incident where a soldier had sought a redress of grievance through the chaplain. He explained:

> The sergeant found out about it and acted accordingly.…
>
> He threatened him with a beating because he went to the padre and had overturned a decision of the sergeant. The sergeant then took him into his office and threatened to beat him. Then he said he would take him outside and do another job on him in the unarmed combat area.[37]

7.45 Clearly, some members perceive those who expose inappropriate practices within their unit as disloyal and deserving punishment.

---

33 *Submission P35*, p. 2.

34 In camera *Committee Hansard*, 29 April 2004, p. 2. Confidential *Submission* C7, p. 1.

35 Confidential *Submission C19*.

36 Confidential *Submission C19A*, p. 2.

37 *Committee Hansard*, 28 April 2004, p. 60.

7.46 The experiences of Aircraftman Nathan Moore stand out as an example of the type of reprisals that are used to punish those who report wrongdoings in their ranks. His complaints and subsequent treatment after reporting drug abuse at Amberley in 2002 have been widely reported in the media in publications such as the *Bulletin* and the *Weekend Australian*.[38] These issues have also been the subject of questioning through the Senate Estimates process for some time.

7.47 There is some contention over whether Aircraftman Moore first reported his concerns to a senior officer at Amberley or independently approached the Australian Federal Police and Queensland Police in May 2002. It was reported in the *Weekend Australian* that Moore raised the issue with a senior officer whose response was '…what do you want me to do about it' and that drugs were 'okay if they use them in their own time'.[39] According to the *Weekend Australian*, it was after this response that Nathan Moore decided to approach the civil authorities. The Chief of Air Force, however, is adamant that Moore first approached the Australian Federal Police and Queensland Police and did not approach the RAAF prior to doing so.[40]

7.48 From May 2002, Aircraftman Moore became an official informant for the Queensland Police on drug activity on and off base. The Queensland Police investigations culminated in a civil drug raid on a number of houses in the south Queensland area on 29 August 2002. This raid found two serving Airfield Defence Wing personnel and one former member involved in illegal drugs.[41]

7.49 The Chief of Air Force advised the committee during Supplementary Budget Estimates in November 2003 that the Commander at Amberley had no knowledge of the raids prior to them taking place and no knowledge that Moore had made drug allegations by way of a formal statement to the Queensland Police.[42] The Chief of Air Force further advised that it was this civil raid that prompted the Commander, Combat Support Group, to question the extent of any drug issue at Amberley by requesting members to come forward with information.

7.50 Based on allegations that were then made by three members (including Moore) on 4 September 2002, the Commander appears to have used all powers

---

38 See Paul Toohey, 'The Fugitive', The *Bulletin*, 23 March 2004 and Cameron Stewart, 'Shot Down', The *Weekend Australian Magazine*, 10-11 July 2004, pp. 22-27.

39 Cameron Stewart, 'Shot Down', The *Weekend Australian Magazine*, 10-11 July 2004, p. 26.

40 Senate Foreign Affairs, Defence and Trade Legislation Committee, Additional Estimates 2003-2004, *Committee Hansard*, 18 February 2003, p. 92.

41 Senate Foreign Affairs, Defence and Trade Legislation Committee, Additional Estimates 2003-2004, *Committee Hansard*, 5 November 2003, p. 128.

42 Senate Foreign Affairs, Defence and Trade Legislation Committee, Additional Estimates 2003-2004, *Committee Hansard*, 5 November 2003, p. 138.

available to him to take action regarding this information, including briefings, interviews and encouraging self-referrals.[43]

7.51 On 29 July 2002, one month prior to the drug raid by the Queensland Police, two RAAF members physically assaulted Aircraftman Moore at his home off-base. He suffered a fractured cheekbone and broken jaw in the attack. The two offenders were subsequently targeted by the Queensland Police drug raid on 29 August 2002.[44]

7.52 It has been reported that, since this incident, Moore has been threatened with physical assault, received death threats, suffered severe psychological stress and has attempted to commit suicide. Moore is reported to have requested a transfer from Amberley when reporting back for duty on 26 August 2002 because he feared for his safety. Both he and the members who had assaulted him were still on base together.

7.53 In September 2002, the RAAF transferred Moore to Brisbane's Victoria Barracks and a month later to RAAF base Richmond. He alleges that he continued to receive threats to his safety and was subsequently transferred a number of times.

7.54 Reprisals, however, do not always take the form of overt threats or acts of physical aggression. They are known to take many various and subtle guises. Failure to be promoted, relocation or ostracism in the workplace can also be used to censure a person for making a complaint. The Australian Peacekeeper & Peacemaker Veterans' Association submitted:

> Defence members who wish to submit an ROG will be strongly advised against doing so by peers and superiors on the basis of its unlikely success and negative impact on careers.[45]

7.55 Witnesses also suggested the use of psychological testing as a means to undermine their credibility for making a complaint.[46] One witness submitted to the committee that:

> There was a determined effort to get me psychologically tested. This was couched in terms of having my best interests at heart…significantly, the label of someone being under 'psychological' care is the first attack a bureaucratic system uses when it wishes to discredit a person.[47]

---

43 Senate Foreign Affairs, Defence and Trade Legislation Committee, Additional Estimates 2003–2004, *Committee Hansard*, 5 November 2003, pp. 128–9.

44 There are two suggestions as to the reason for this assault. First, that LAC Moore had become known as an informant, or second, that it was over a girl that both Moore and one of his attackers had been seeing. See for example, Paul Toohey, 'The Fugitive', The Bulletin, 23 March 2004. See also Senate Foreign Affairs, Defence and Trade Legislation Committee, *Committee Hansard*, Estimates, 5 November 2003, p. 141.

45 *Submission P42*, p. 3. See also Ms Jayne Fitzpatrick, *Submission P35* and Confidential *Submission*s *C25, C25A, C40, C40A, C42* and *C56*.

46 Confidential *Submission*s *C25, C40, C51* and *C59*.

47 Confidential *Submission C40A*.

7.56 The number of requests made to the committee to receive submissions on a 'confidential basis' because of likely adverse repercussions is a further indication of a widespread prevalence of this fear of reprisal for reporting failings in the ADF.[48] A number, who were serving members, stated quite clearly their apprehension that they would suffer adverse action should it become known that they had made a submission.[49] One submitter wrote:

> In this culture, the identity of Defence personnel in Senate submissions can have an adverse effect on an individual's reputation and tenure in the Defence force. I appreciate that although the ADF has publicly declared that all ADF personnel are free to make submissions to the Senate Committee, I can tell you that within Defence ranks an atmosphere of fear often drives personnel to remain silent least they may suffer covert consequences for 'going public'.[50]

7.57 Another believed that knowledge of his submission to the committee may prejudice or jeopardise his civilian employment and 'make it exceedingly difficult to deal with various persons in key executive positions in Defence'.[51]

7.58 The committee accepts that the senior leadership of the ADF would uphold the right of an ADF member to make a submission to a parliamentary committee without that person suffering adverse consequences. It is clear, however, from the concerns expressed, that ADF members do not necessarily feel confident to exercise this right.

7.59 Clearly, the assurances offered by the ADF that a person will be punished for threatening to intimidate or causing detriment to another for making a report is falling on deaf ears. Many members in the ADF have a strong and embedded belief that, if they disclose wrongdoing some form of detriment will follow, particularly to career prospects. For them silence is the best option—it holds less risk.

Lack of awareness of alternative reporting avenues

7.60 While a number of witnesses gave evidence of being actively discouraged from making a complaint or being reluctant to approach their superiors, others spoke of their frustration with, or lack of understanding of, the processes involved.[52] Some of those unwilling to take their concerns to their superiors felt that there was no where

---

48 Confidential *Submission C57*. Also Confidential *Submissions C8, C9, C16, C25, C26, C33, C43*.

49 Confidential *Submission C57*. Also Confidential *Submissions C8, C9, C16, C25, C26, C33, C43*.

50 Confidential *Submission C33*.

51 Confidential *Submission C57*.

52 See for example, Ms Jayne Fitzpatrick, *Submission P35*. Confidential *Submission C35* stated that he did not report incidents straight away 'because I did not know I could. I was confused about how the military worked with things like this'.

else to turn. One member, who alleged that he suffered serious reprisals for reporting the use of illegal drugs in his unit, told the committee:

> There was no known avenue for soldiers to complain. We did not know of any right of complaint besides that of through your chain of command, in this case the very people inflicting the wrongdoing. At no time during my period at…was there any mention of, or attempt to mention, a soldier's rights to bypass superiors in relation to ill-treatment. [53]

7.61 The common understanding was 'What happens in our unit stays in our unit. Nothing goes out of here'.[54]

7.62 Another member explained that he did not report abusive conduct because he did not know that he could—'I was confused about how the military worked'.[55] Similarly, the parents of a young soldier reported that their son, together with others, was 'totally unaware' of the avenues available to report wrongdoing. They informed the committee that the soldiers:

> …were of the understanding that the chain of command must be taken within your troop, thus making it impossible to really complain or do anything about a situation. So with that came the total feeling of powerlessness, the feeling of isolation and being 'trapped', another frequently used term by soldiers.[56]

7.63 The parents suggested the establishment of an independent grievance body available to all serving personnel, located somewhere off base, so that soldiers who feel that they have problems can go and speak with someone who is 'civilian'.[57] A number of witnesses put similar proposals.[58]

Frustration with administrative complaint handling processes

7.64 The breakdown in communication once a report had been made was a common complaint cited in evidence. Lost paperwork, misplaced applications for transfers, failure to respond to correspondence, and documentation simply not produced were among the complaints raised.[59] One member stated that he was:

> …given the run-around by the Defence Equity Organisation when I was attempting to obtain advice on how to proceed. The lack of support

---

53 In camera *Committee Hansard*, 29 April 2004, p. 20.

54 In camera *Committee Hansard*, 29 April 2004, p. 9.

55 Confidential *Submission C35*.

56 Confidential *Submission C19*.

57 Confidential *Submission* C19A.

58 See para 7.19.

59 See Ms Marlene Delzoppo, *Submission P1*, p. 2; Ms Jayne Fitzpatrick, *Submission P35*; Confidential *Submission C29*.

> provided by Air Force during this critical period has now been compounded by a defective investigation.[60]

7.65 Mr Keith Showler related how he had suffered constant harassment and verbal abuse from an officer to whom he was answerable. Having suffered a breakdown and been hospitalised in February 2002, Mr Showler stated that nothing was annotated on his medical files at the time. He explained that he submitted the appropriate paperwork through the Equity Officer at the Hospital detailing the harassment and abuse he had received during his deployment. He noted that, in June 2002, he attended the initial interview with the investigating officer and over the following 13 months requested, from his former Commanding Officer, a copy of the investigating officer's report and details of his hospitalisation. He informed the committee that the last correspondence he received from the Commanding Officer advised that he would have to contact Defence Health for the records but that 'the attending doctor or the medical staff have never furnished these details'. [61]

7.66 Whether the lack of attention given to a report or complaint stems from a deliberate effort to prevent a report or complaint from proceeding or from a failure to appreciate the importance of acknowledging a person's concerns, the result is the same—exasperation with the processes and a lack of confidence in the system.

Seeking a transfer or discharge as an alternative to reporting wrongdoing

7.67 A number of witnesses reported that they did not make a complaint hoping instead that their experiences would be temporary and would be remedied by a transfer. One witness stated her belief that 'a lot of things are perceived as one-off events—that they are not going to happen again—and therefore there is a sense that it is just managed for this event'.[62] Others simply put up with mistreatment. Mrs Williams explained that:

> …at the moment, you will not have soldiers coming forward to complain about the way they are being treated by an NCO because they now know, as a result of this, that nothing will happen to them. So they will sit in silence and suffer in silence.[63]

7.68 Others, however, just gave up. They sought a release through discharge from the forces. When asked whether he had formally submitted a notice of grievance, Mr Showler replied, 'I have literally walked away from the military now—other than, as I said, in February of this year when I wrote to the Chief of Staff of Air Force Health

---

60 In camera *Committee Hansard,* 21 April 2004, p. 3.

61 *Submission P3*, p. 1. Also *Committee Hansard*, 28 April 2004, pp. 20–21.

62 *In camera* Committee Hansard, 9 June 2004, p. 9. Also Confidential *Submission C19* which gives an account of a soldier who alleges he was subjected to bullying and sought a transfer.

63 *Committee Hansard*, 28 April 2004, pp. 60–61.

Records to get a copy of my records that were never written.'[64] A former member of the ADF told the committee:

> It takes an enormous amount of courage to take on the Military system and the system will and does use inordinate amounts of power to manipulate any inquiry or any investigation that suits their agenda, knowing full well that the member will in most cases capitulate in fear that their career will be destroyed through intimidation, implied or real.[65]

Committee view

7.69 The committee cannot ignore the instances of breakdowns in the reporting system that allowed unsafe practices to go unheeded for some time. It is concerned about the ineffectiveness of the reporting system as an early warning system and as a means of stopping unsound practices.

7.70 The experiences recounted in evidence provide some understanding of the reasons ADF members do not make complaints. Their reluctance to disclose wrongdoing to their superiors or senior officers is a certain indication of systemic problems in the reporting process. Evidence suggests that for many the reporting system does not inspire confidence and fails to counter the culture of silence. The committee found that ADF members are reticent to use the reporting system and many choose to remain silent because of:

- the requirement to use the chain of command and the potential conflict of interest which creates a perception that the process may be unfair and the system lacks integrity;
- the cultural environment that values team work, group solidarity and conformity but which, in some cases, gives rise to a misplaced sense of loyalty that discourages the reporting of wrongdoing—members do not want to appear weak or disloyal;
- institutional blind spots which make it difficult for some members, particularly the professional and dedicated ADF member, to admit to failings in the organisation or their colleagues;
- the fear of the stigma attached to making a report and the prospect of reprisals that may take many different forms from threats of physical harm to likely damage to career;
- a lack of awareness of alternative means of making a report or lodging a complaint;
- the complicated reporting process with its delays and frustrations and, in any event, a sense that a complaint may prove futile—complainants simply give up; and

64 *Committee Hansard*, 28 April 2004, p. 28.

65 *Submission P12*, p. 2.

- a hope that the situation is transitory which means that they seek alternative 'escape' solutions such as a transfer. Those in more dire situations often seek discharge from the forces.

Whistleblowing scheme

7.71 The committee now turns to the Defence Whistleblower Scheme which offers another avenue for reporting wrongdoing. Although the committee did not examine this aspect of the administrative system in detail during the inquiry, it briefly discusses the whistleblower scheme in the following section.

7.72 Currently, the Inspector-General of Defence (IG) is responsible for the management of the Defence Whistleblower Scheme. Matters reported to him or her concerning the administration of military justice will normally be referred to the Inspector-General of the Australian Defence Forces.[66]

7.73 Even though the Defence Instructions on the Defence Whistleblower Scheme state that it is 'an alternative process for the reporting and investigation of misconduct when the whistleblower lacks confidence in the normal reporting process', the expectation is still that members will use the chain of command first.[67] A whistleblower may report anonymously or request that their identity be protected.

7.74 Defence has had an administratively based Whistleblower scheme in place since 24 July 1997. The scheme was originally intended to provide 'an effective mechanism for Australian Public Service employees and ADF members to disclose mismanagement or corruption in the department'. The scheme focused specifically on fraud and probity issues.[68] The Burchett Report in 2001 recommended widening the scope of the scheme to incorporate matters other than fraud and probity issues. Under the current scheme, the types of suspected misconduct that may be the subject of a whistleblower report include activities such as fraud, misconduct under the *Public Service Act 1999,* harassment or unlawful discrimination, and practices that compromise occupational health and safety.

Defence Instructions note:

---

66 Defence Instructions (General) ADMIN 61-1, Inspector-General of the Australian Defence Force – role functions and responsibilities, para. 9. It reads: '…attention is drawn to the distinction between the respective responsibilities of the IGADF and the Inspector-General Defence (IGD). In short, the IGADF is responsible for matters relating to the administration of Military Justice and IGD is responsible for matters relating to fraud, lack of probity, ethics and management audit. IGD is also responsible for the management of the Defence Whistleblower Scheme. Matters reported to the Defence Whistleblower Scheme concerning the administration of Military Justice will normally be referred to the IGADF.'

67 Defence Instructions (General), Defence Whistleblower Scheme, paras 8, 12 and 13.

68 Department of Defence, submission to the Senate Finance and Public Administration Committee's inquiry into the Public Interest Disclosure Bill (2000 [2002]), dated 4 October 2001.

> Whilst the IG's organisation has responsibility for the management of this scheme and for the management of persons who make a report through this scheme (including identity protection if necessary), the actual investigation may be conducted by another agency. The IG will determine the most appropriate investigative or other relevant authority in consultation with the whistleblower.[69]

7.75 A number of members referred to the ADF's whistleblowing scheme. Mr Showler stated, 'The new equity system called the Defence Whistleblowers Scheme indicates to me that the 'fair go' system failed. In view of my case, who in their right mind is going to be a whistleblower in the Defence Force?'[70] Another witness maintained that he had not been afforded protection and has suffered career detriment on account of reporting impropriety.[71]

Protection from reprisal

7.76 If a whistleblower scheme is to remain a credible mechanism for the reporting of wrongdoing, it must offer a guarantee that a person will not suffer on account of making a report. The committee is concerned with the section in Defence Instructions that reads:

> There may also be a requirement for the provision of physical security of the whistleblower and special provisions may be considered on a case-by-case basis. For example, security escorts may be provided or, in exceptional circumstances, the matter may be referred to an external agency. In some circumstances, it may be necessary to transfer a whistleblower to another work location.[72]

7.77 Although the committee accepts that the requirement for protection may be the reality, the statement does not inspire confidence in the military justice system where protection relies on removing the person from harm rather than stopping the perpetrators. Relocation, in itself, may be a form of reprisal for making a report. The committee would like to see emphasis given to stamping out acts of reprisal.

7.78 The case of Aircraftman Nathan Moore illustrates the failure of the ADF's whistleblower scheme to protect members from adverse action on account of that member reporting wrongdoing. It also highlights the confusion surrounding who has responsibility for protecting those who report wrongdoing. The RAAF was clearly of the view that Moore provided information relating to drug use to civilian authorities. Because he made his complaints to outside authorities who conducted the investigation, the Defence Whistleblower Scheme would not become involved in that matter. Moore did, however, alert the whistleblower scheme to his concerns about

---

69 Defence Instructions (General), PERS 45–5, Defence Whistleblower Scheme, para. 39.

70 *Committee Hansard*, 28 April 2004, p. 21.

71 Confidential *Submission C56*.

72 Defence Instructions (General), PERS 45–5, Defence Whistleblower Scheme, para. 34.

harassment and intimidation. According to Air Marshal Angus Houston, the Defence Whistleblowing Scheme 'only provides protection of identity, it does not provide protection in other ways'.[73] He explained the steps taken by the ADF to protect Nathan Moore:

> AC Moore returned to work and almost immediately he expressed concerns about his safety. We responded immediately to that and we moved him off base to Brisbane. He still had concerns about his safety. In fact, he expressed concerns for his safety to the inspector-general here in Canberra. That came to my notice so we moved him again. We moved him down to Richmond, then we moved him to Glenbrook and then we moved him into Sydney. We kept moving him when he felt unsafe. We have moved him again—and I prefer not to mention where he is at the moment—but we are very concerned for his welfare. We have a case officer who is supporting him and we are concerned for his welfare.[74]

7.79 Air Marshal Houston believed that the decisions taken at the time to assist Moore were very reasonable. He nonetheless acknowledged that:

> …perhaps we need to have a look at how we approach these sorts of circumstances in the future.[75]

7.80 It is clear that the Defence Whistleblower Scheme does not have adequate measures to protect those making genuine disclosures from unlawful reprisals.

Confidentiality

7.81 Reporting systems must have in place safeguards to protect the confidentiality of all parties involved in the report. In keeping with this principle, the Defence Manual underlines the importance of maintaining confidentiality and respecting a person's right to privacy. Yet practice is not always consistent with this guidance.[76] A number of witnesses were concerned with the treatment of confidential information. Complaints about violations of privacy rights came from persons who had reported the wrongdoing and who believed that there had been a serious breach of trust in allowing their identity to become known. Criticism also came from people who were the subject of a complaint and who also believed that their identity and the allegations against them had been disclosed unnecessarily.[77]

---

73 Senate Foreign Affairs, Defence and Trade Legislation Committee, *Committee Hansard*, Estimates, 18 February 2004, p. 91.

74 Senate Foreign Affairs, Defence and Trade Legislation Committee, *Committee Hansard*, Estimates, 5 November 2003, p. 142.

75 Senate Foreign Affairs, Defence and Trade Legislation Committee, *Committee Hansard*, Estimates, 18 February 2004, p. 91.

76 Confidential *Submission C61*.

77 Confidential *Submission* C37.

Committee view

7.82 The whistleblower scheme is intended to offer a viable alternative for people wishing to report wrongdoing but who believe that they 'may be victimised, discriminated against or disadvantaged in some way if they make a report through the chain of command, line management, or established complaint mechanisms.'[78] The committee has concerns that the scheme is not meeting expectations especially in light of the range of obstacles identified in this chapter that stop people from reporting wrongdoing.

7.83 The committee is strongly of the view that the ADF needs to examine very critically its whistleblowing scheme and more broadly the arrangements that it has in place to protect those who report improper conduct. The reliance placed by senior leadership in the ADF on physically removing a person, often more than once, from the threat of reprisal is in itself an acknowledgement that the protection scheme does not work. Indeed it is ironic that this measure is regarded as a 'solution' seemingly before the prevention of reprisals is considered a solution. The committee accepts that the ADF has an uphill battle in convincing a highly sceptical workforce that reprisals will not take place. It must take firm steps initially to have a protection scheme that will offer ADF members assurances that they will not suffer detriment for making disclosures, in good faith, about wrongdoing.

7.84 The committee is also concerned with the scheme's overall integration in the ADF's system for reporting wrongdoing or making a complaint. It is concerned that the current system may be confusing and result in a duplication of responsibilities especially with regard to the bodies responsible for the protection of people making a complaint and for the prosecution of unlawful reprisals.

Improvements to the ADF's reporting system

7.85 Following the JSCFADT's report and the Burchett Report, the ADF has taken measures to improve its reporting procedures. In the Government's response to the joint committee's findings, it stated:

> In order to strengthen the equity and fairness environment within Army, the Chief of Army issued his *Plan for a Fair Go.* A key element of the plan was the promulgation across the Army of his strong and clear expectation of the required standards of behaviour in the form of 'Fair Go' rules. These have been supported by the establishment within Army of an additional hotline to those normally operating within Defence, for individuals to confidentially seek assistance outside of the normal command chain, if necessary. Additionally, the *Plan for a Fair Go* included a review of equity

78 Defence Instructions (General), Defence Whistleblower Scheme, par 13 and Annex A, Guidance on the Reporting of Suspected Misconduct, para. 6.

> training, the redevelopment of equity training packages, the conduct of a baseline equity audit and two follow-up equity audits.[79]

7.86 Updating progress on the implementation of the Fair Go scheme, Lieutenant General Leahy told the committee:

> The Fair Go Hotline is used often and provides a useful safety valve for members of the Army who are unwilling to raise allegations of harassment or mistreatment within their chain of command, or who have done so but believe their grievance has been inadequately dealt with. Army members' family and friends may also call the hotline anonymously if they wish. All calls are treated very seriously. Where appropriate, allegations of offences or unacceptable behaviour are investigated. The Army hotline has proved an effective, strong and very successful system.
>
> …
>
> We have trained staff who receive those calls. They counsel the people and encourage them in the first instance to deal with it through the chain of command. Where the callers are not comfortable dealing with that, the staff will take it on and deal with it themselves. We have found a very high level of satisfaction with the Fair Go Hotline. People tend not to call back. We find that it is working very well. It acts as a bit of a circuit-breaker. When the staff on the hotline are able to explain some of the issues and perhaps some of the administrative procedures and policies, it seems to take the heat off.[80]

7.87 In the view of Ms Jayne Fitzpatrick, however, who sought assistance from the Hotline on behalf of her partner, 'the Defence Equity Hotline and the Fair Go Hotline have been set up as a public relations exercise, they seem to do little for members'.[81] Her husband suffered from Post Traumatic Stress Disorder, had attempted suicide and, according to Ms Fitzpatrick, had been defamed in front of the Sergeants' Mess. She informed the committee:

> Prior to Keith's discharge he wrote to the much vaunted Army Fair Go Hotline. As a serving member his complaint should have been investigated in its own right. This was Keith's only way to redress the defamatory remarks and threats made against him. Unfortunately the reply came back that his complaint had been addressed by my letter to the minister and no further action would be taken on his behalf.[82]

7.88 The committee accepts that not every complaint will be resolved to the satisfaction of the complainant. The process should, however, be an efficient and

---

79 Media Release, the Hon. Danna Vale, MP, Minister Assisting the Minister for Defence, Government Response to the Report on *Rough Justice? An Investigation into Allegations of Brutality in the Army's Parachute Battalion,* No. MIN 203221/02, 22 March 2002.

80 *Committee Hansard*, 1 March 2004, pp. 35–6.

81 *Submission P35*, p. 4.

82 *Submission P35,* p. 2.

transparent one, free from the perception of bias. Members of the ADF should have a sound understanding of how the process operates and have easy access to agencies responsible for dealing with complaints or reports of wrongdoing.

7.89 Following the various recent inquiries into the military justice system, the ADF has introduced a series of initiatives which have resulted in a number of bodies now dealing with various aspects of the administrative system which aside from the chain of command includes:

- the Inspector-General of the ADF;
- the Defence Whistleblower Scheme Hotline (under the Inspector General of Defence);
- the Defence Equity Organisation;
- the Complaints Resolution Agency;
- the Directorate of Alternative Dispute Resolution and Conflict Management; and
- the Army Fair Go Hotline.[83]

7.90 This list of options presents ADF members with a mixed and confusing set of choices. It is not always clear to the ADF member, let alone an observer, which is the most appropriate route to take. Clearly, ADF members need a reporting system that is simpler to use and provides the necessary support for those seeking to lodge a compliant or report wrongdoing.

Conclusion

7.91 Without doubt, there is an embedded anti-reporting ethic in some areas of the ADF. The reticence to report improper conduct or to make a legitimate complaint means that responsible commanders are not well placed to detect and correct wrongdoing and hence unsafe practices or inappropriate conduct continue unchecked.

7.92 The committee understands that a fundamental change in the ADF mindset must be achieved to overcome the stigma attached to lodging a complaint.

7.93 Furthermore, members will not make reports if they believe they will not be protected from reprisals. The administrative system must be sufficiently robust to instil confidence in members that if they do the right thing they will be protected; that allegations will be duly investigated; that they will not suffer reprisals on account of making a complaint; and that offenders will be brought to account. The committee accepts that removing the fear of reprisal is a most difficult challenge but one that should not be shirked.

---

83 Department of Defence, http://www.defence.gov.au/mjs/st/mjs/organisations.cfm (23 February 2005).

7.94 Clearly, education is one answer. The recommendation for improved education has been made by a number of inquiries and needs to be reinforced yet again. The committee underlines the need for the ADF to review the way it promotes its reporting schemes and to put in place a more thorough education program designed to familiarise members with the system but also to develop an education program designed to counter the culture of silence.

7.95 Even so, the committee is not convinced that the reporting system as now structured provides the most effective avenues for the disclosure of wrongdoing. Evidence before this committee suggests that the reporting system falls down in its practical application and its ability to convince members of the merits of the system. It accepts that the reporting system has on occasion failed its members. At times, it has caused great distress to members and next of kin who found difficulty in having their concerns acknowledged, listened to and acted upon. The committee is not convinced that the Fair Go Hotline or similar initiatives are the complete answer. Rather they provide another add-on reporting mechanism to a system that is confused and fundamentally flawed, and they do nothing to counter systemic problems such as conflicts of interest, the culture of silence and fear of reprisal. Overall, the committee believes the system would operate more effectively if it were less complicated and more streamlined.

7.96 In chapter 11, the committee has recommended the establishment of an independent grievance review body to be known as the Australian Defence Force Administrative Review Board (ADFARB). This board is not intended to remove the responsibility for resolving disputes from the chain of command. Rather it will provide a mechanism to resolve grievances that are unable to be resolved promptly and effectively within the chain of command. This initiative will remove some of the problems identified in this chapter (see recommendation 29).

7.97 In proposing the establishment of an independent Australian Defence Force Administrative Review Board, the committee took particular account of situations that may arise where an ADF member is reluctant to report a wrongdoing. It recommended that the ADFARB receive reports and complaints directly from ADF members where:

- the person making the submission believes that they, or any other person, may be victimised, discriminated against or disadvantaged in some way if they make a report through the normal means; or
- the person has suffered or has been threatened with adverse action on account of his or her intention to make a report or complaint or for having made a report or complaint.

The committee is also very concerned to ensure that ADF members who choose to disclose improper conduct or work practices are protected from reprisals for making such a report.

Recommendation 24

7.98 In line with Australian Standard AS 8004–203, Whistleblower Protection Programs for Entities, the committee recommends that:

- **the ADF's program designed to protect those reporting wrongdoing from reprisals be reviewed regularly to ensure its effectiveness; and**
- **there be appropriate reporting on the operation of the ADF's program dealing with the reporting of wrongdoing against documented performance standards (see following recommendation).**[84]

Using complaints as signposts to broader problems

7.99 Before concluding this chapter, the committee underlines the important role of an effective reporting system in producing information that provides an accurate representation of the overall state of the military justice system. The Burchett Report was of the view that:

> …the diversity of the ADF, and the upheavals it has gone through in recent years, make for the possibility of occasional lapses, unless preventative steps are taken. It is important to set in place some means of detecting misconduct promptly, when it occurs, so that its perception by the ADF does not have to await an eruption in the form of notorious events. It is necessary to maintain constant vigilance, including the monitoring of key indicators and the provision of means for problems to be aired and dealt with, as they arise.[85]

7.100 Taking up the same point, the Defence Ombudsman stated:

> Over time, in the 25 or so years that the Ombudsman's office has been going, one of the points it has tried to emphasise to agencies is that complaints should not be seen as discrete problems, as idiosyncratic occurrences that can be corrected and then put aside. Complaints, even though they can be episodic and unrepresentative, should nevertheless be regarded as an indication of matters that require internal attention. There is a whole philosophy out there now that complaints can provide an agency with an opportunity for a dedicated learning process. It is our impression that there is more work to be done within the Australian Defence Force in establishing recognition of the point that complaint handling, investigation and administration is regarded as something inextricably interwoven with the remainder of the operation of the Australian Defence Force.[86]

---

84 Standards Australia, Australian Standard AS 8004–2003, paras 2.4.3 and 2.4.4.

85 Report into Military Justice in the Australian Defence Force, conducted by Mr J.C.S.Burchett, QC, An Investigating Officer appointed by the Chief of the Defence Force, under the Defence(Inquiry) Regulations 1985, p. 28.

86 *Committee Hansard,* 9 June 2004, pp. 1–4.

7.101 The committee believes that it is vital for the ADF to be aware of and to monitor the effectiveness of its reporting system. A continuous assessment would not only provide information on the incidents of wrongdoing and the prevalence of unacceptable behaviour throughout the ADF but could also be used to gauge the extent to which members are deterred from reporting wrongdoing or making a complaint. The committee found the survey conducted by the Directorate of Strategic Personnel Planning and Research on the experiences of unacceptable behaviour in the Australian Defence Force extremely helpful as an indicator of the willingness or otherwise of members to report inappropriate behaviour.

7.102 The committee notes that Defence's Annual Report contains statistics on the percentage of reported unacceptable Behaviour Incidents by Service. It, however, provides no context and no meaningful analysis or commentary on these statistics. The committee believes that more searching questions could be asked of these statistics regarding the failure to report an incident and the reasons for this lapse. Such information would allow better informed public debate on the reporting of wrongdoing in the ADF and allow Parliament to carry out its scrutiny role more effectively.

Recommendation 25

7.103 The committee recommends that, in its Annual Report, the Department of Defence include a separate and discrete section on matters dealing with the reporting of wrongdoing in the ADF. This section to provide statistics on such reporting including a discussion on the possible under reporting of unacceptable behaviour. The purpose is to provide the public, members of the ADF and parliamentarians with sufficient information to obtain an accurate appreciation of the effectiveness of the reporting system in the ADF.

7.104 To this stage, the report has examined the reporting procedures for wrongdoing or for making a complaint. The following chapter examines the next stage of the administration system—the investigation following a report of wrongdoing or a complaint.

Chapter 8

The administrative system—investigations

The inquiry process

8.1 The previous chapter examined the process of reporting wrongdoing or making a complaint about inappropriate conduct. The receipt of a complaint or report triggers further administrative action which generally involves some form of investigation. This chapter examines the inquiry stage of the administrative system. It describes the types of administrative inquiries and then focuses on the routine inquiry and the investigating officer inquiry. It considers the criticism levelled at the inquiry process and assesses its overall effectiveness.

8.2 The inquiry process is one of the major components of the administrative system. Administrative inquiries are fact-finding undertakings to help commanders make decisions in response to incidents that may affect the ADF.[1] They are not judicial procedures; they do not involve courts or tribunals. Their purpose is not to investigate whether ADF members have committed an offence under the DFDA or civilian criminal laws. The Department of Defence explained:

> Adverse findings or recommendations about a member that are of an administrative character are incidental to the primary purpose of an inquiry—that is, to find the facts as to why an incident occurred.

8.3 Administrative inquiries can take a number of forms but are always preceded by a brief initial inquiry designed to provide a quick overview of the matters under consideration.

Quick assessment

8.4 Following the notification of an incident or complaint, a quick assessment must be undertaken. The Administrative Inquiries Manual makes clear that it is mandatory to conduct a quick assessment before the commanding officer takes any further action.[2] This preliminary assessment is not an inquiry under the Defence (Inquiry) Regulations but rather derives its authority from 'the inherent powers of military rank and command'.[3] Quick assessments are intended to establish whether any immediate corrective action needs to be taken to reduce the risk of any further harm or damage. They also provide the means for determining the most appropriate course to take in dealing with the report or complaint.

---

1 *Submission P16*, p. 24.

2 Australian Defence Force Publication, Administrative Series, *Administrative Inquiries Manual,* para 2.3.

3 Australian Defence Force Publication, Administrative Series, *Administrative Inquiries Manual,* para 2.1.

Figure 6.1—Administrative inquiries as part of the ADF's administrative system

Army News, Issue 1093, 25 March 2004.

8.5 When appointing a person to conduct a quick assessment, the commanding officer does not need to use Instruments of Appointment or draw up terms of reference. An oral briefing should suffice and 'an outline of that brief should be documented'.[4]

8.6 Based on the results of the quick assessment, a commander may decide that alternative conflict resolution methods such as conciliation or mediation may be a better and more constructive means of resolving a problem than holding a formal inquiry. These alternative dispute resolution methods are suitable for minor workplace complaints (see paras 6.5–6.9). On the other hand, the assessment may show that, because of the seriousness of the incident, a formal inquiry such as an investigating officer inquiry is required.

8.7 The CO is required to record the decisions taken in respect of an incident or complaint together with a short summary of reasons for the decision. This report is to be retained on the appropriate unit file.

8.8 With regard to preliminary processes following a sudden death or accident, Lieutenant General Peter Leahy explained some of the current procedures:

> The first thing we ask for in sudden deaths or other very serious accidents is a quick assessment. Rather than prepare terms of reference, we want to know right now whether there is anything we should be doing that might stop something from happening again. Under the Defence (Inquiry) Regulation, the terms of reference are drawn up and an investigating officer is appointed and he will take statements and evidence and talk to witnesses. But what we are seeing is that the two ways are separate things. The first is a commander's quick assessment of what happened and what we can do right now to stop it; the second is under the Defence (Inquiry) Regulation.[5]

8.9 The quick assessment phase drew little comment from witnesses. It should be noted, however, that Mr Geoffrey Earley, Inspector-General Australian Defence Force, expressed concern that:

> There is some evidence—not a lot—that, because it is easy and quick, a quick assessment may be used, if we are not careful, as the actual inquiry. It was not intended to be that way but, again, it is understandable in some cases why that might happen. We need to make sure that does not develop.[6]

8.10 The experience of one witness touched on this matter of the scope and intention of the quick assessment. In his case, the quick assessment 'went beyond a mere scoping exercise and made findings of fact and recommendations like a routine inquiry'. He observed that, 'a Routine Inquiry would have given you an opportunity to

---

4 Australian Defence Force Publication, Administrative Series, *Administrative Inquiries Manual*, paras 1.12 and 2.4.

5 *Committee Hansard,* 1 March 2004, p. 41.

6 *Committee Hansard*, 5 August 2004, p. 100.

respond to the allegations made against you, whereas the so-called quick assessment did not. It was not a quick assessment at all, and did not lead to any further inquiry'.[7] Another witness maintained that, in his case, the mandatory quick assessment before the appointment of the investigating officer was not carried out.[8]

8.11 The committee notes and endorses Mr Earley's concerns and suggests that the ADF underline the function and role of the quick assessment in its manual.

Recommendation 26

8.12 The committee recommends that the Defence (Inquiries) Manual include at paragraph 2.4 a statement that quick assessments while mandatory are not to replace administrative inquiries.

8.13 As the following section illustrates, there are a number of options available to the commanding officer if he or she decides that a formal inquiry is needed.

Types of administrative inquiries

8.14 If the commanding officer decides, after a quick assessment has taken place, that an inquiry is needed, he or she must determine the appropriate type of inquiry. Inquiries take various forms according to the seriousness, magnitude and complexity of the circumstances surrounding the incident. The following inquiries are ranked in ascending order of their significance depending on the importance and likely consequences to the ADF or to broader national interests:

- a Routine Inquiry—conducted with as little formality as possible, and is frequently employed in response to a redress of grievance issue at unit level and examines less serious or complex matters, such as 'minor loss or damage to Service property, harassment or personnel management issues';[9]
- an Investigating Officer—used by commanders to investigate a wide range of significant matters concerning the ADF which arise under their command or control but do not require the standing or status of a Board of Inquiry;
- a Board of Inquiry—appointed by a senior commander to inquire into matters concerning the administration or aspects of the command control of the ADF;
- a Combined Board of Inquiry—established to inquire into matters concerning the ADF and the armed forces of another country; and

---

7 Confidential *Submission C25C*, Enclosure to IGADF submission.

8 Confidential *Submission C39*, Attachment.

9 *Submission P16*, pp. 24-5 and Australian Defence Force Publication, Administrative Series, *Administrative Inquiries Manual*, para. 1.1–1.22.

- a General Court of Inquiry—appointed by the Minister, has extensive powers, is chaired by a judge or senior lawyer and its members are expected to have greater breadth and depth of experience. It is appropriate in cases of very serious and complex matters such as matters of national significance.

8.15 To date, a General Court of Inquiry and a Combined Board of Inquiry have not been used and will not be discussed in detail in this report.[10] Chapter 12 will look at the Board of Inquiry. This chapter examines the Routine and the Investigating Officer inquiries.

Routine inquiry

8.16 Routine Inquiries are intended to deal with less serious and less complex matters and are thus conducted on a relatively informal basis free from the constraints of the requirements under the Defence (Inquiry) Regulations.[11] A CO may appoint any member of the Defence Force who is an officer, warrant officer or senior non-commissioned officer to conduct a Routine Inquiry.[12]

8.17 The Administrative Inquiries Manual stresses the importance of inquiries complying with 'applicable standards of procedural fairness and administrative law'.[13] Although it recognises that the informality of a Routine Inquiry offers advantages, it nonetheless sets down principles that should be observed during this process. They require the inquiry to be conducted without bias and without the investigator prejudging either a complainant or the person who is the subject of the complaint.

8.18 Furthermore, routine inquiries are not to be conducted without informing a person of an allegation or complaint that has been made against him or her. Such a person is to have adequate opportunity to respond to any allegation or complaint. He or she should be provided with all material relevant to the allegation and have the right to have any information provided by them considered by the officer conducting the inquiry. Witnesses before a Routine Inquiry may seek legal advice but they are not entitled to legal representation.[14] It should be noted that inquiries are held in private.

8.19 A Routine Inquiry requires a written report to the commanding officer. There are no specific reporting requirements and the reporting will be at the discretion of the commanding officer. If the investigating officer has the authority to make

---

10 *Submission P16*, pp. 24-5.

11 Defence (Inquiry) Regulations, regulation 69 and 70A.

12 Australian Defence Force Publication, Administrative Series, *Administrative Inquiries Manual,* para. 4.1.

13 Australian Defence Force Publication, Administrative Series, *Administrative Inquiries Manual,* para. 4.1.

14 Australian Defence Force Publication, Administrative Series, *Administrative Inquiries Manual,* paras 4.28.

recommendations, the report should include recommendations that are based on the findings and which the investigating officer thinks fit to make.[15]

8.20 The commanding officer considers the findings and recommendations contained in the report. He or she is not bound by these recommendations and may decide which of the recommendations will be implemented.[16] As soon as possible after any decision based on the report is made, the commanding officer is to provide complainants and respondents who gave evidence to the inquiry with written notification of the results of the inquiry with regard to matters relevant to them.[17] The reports of Routine Inquiries are to be retained on the appropriate unit file.

Officer Investigation

8.21 A commanding officer, or an officer holding an appointment superior to that of a commanding officer may appoint an investigating officer to inquire into a complaint or incident concerning the ADF which is under his or her command.[18] The purpose of the inquiry is to establish the facts and circumstances surrounding an incident or complaint so that an informed decision can be made about action that should be taken. An investigating officer is not to conduct a criminal or disciplinary investigation nor determine that an offence has or has not been committed.[19]

8.22 He or she is not authorised to 'pass judgement'. Lieutenant General Leahy told the committee that an inquiry is conducted so that steps can be taken immediately to find out what happened and to put in place actions and procedures that would prevent it happening again.[20] He underlined the point that the task of an investigating officer is not to apportion blame and hold people accountable but to establish what happened.

8.23 The regulations require that, where the investigating officer is satisfied that all information relevant to the inquiry that 'is practicable to obtain has been obtained, he or she shall prepare a report setting out his or her findings'.

8.24 Recommendations coming out of an inquiry may then lead to either an administrative or legal process that may apportion blame. A person with the

---

15 Australian Defence Force Publication, Administrative Series, *Administrative Inquiries Manual*, paras 4.35 and 4.43.

16 Australian Defence Force Publication, Administrative Series, *Administrative Inquiries Manual*, para. 4.38–4.41.

17 Australian Defence Force Publication, Administrative Series, *Administrative Inquiries Manual*, para. 4.44.

18 Australian Defence Force Publication, Administrative Series, *Administrative Inquiries Manual*, para. 5.3.

19 Australian Defence Force Publication, Administrative Series, *Administrative Inquiries Manual*, paras 6.3–6.4.

20 *Committee Hansard*, 5 August 2004, p. 21.

appropriate responsibility and authority will then determine a person's innocence or guilt. Lieutenant General Leahy explained:

> It might be that at some DFDA hearing or some other form of hearing later, where people have the responsibility and the authority to judge whether it was innocent or guilty by hearing all of the facts from both defence and prosecution and by considering the law, that is where judgments are made and blame is apportioned.

Again he stressed that the investigating officer 'tells us what happened'.[21]

The importance of a well-conducted investigation

8.25 The committee recognises the central importance of the inquiry process to the overall effectiveness of the administrative system. Any shortcomings or failings during this stage have the potential to set the administrative proceedings on a long and troubled course that could drag through the system for years. The integrity of the inquiry process and its ability to protect the fundamental rights of those involved in the process are crucial to its credibility and its effectiveness. The Burchett Report observed that:

> …if an investigation is conducted carelessly or incompetently, so as to miss the real point, or if it is conducted in such a manner that, although its actual conclusions are realistic, the persons most concerned are left with a feeling that they have not been treated fairly, no decision dependent upon the investigation is likely to be received with general satisfaction…the person it is important to convince that all arguments have been fairly and fully considered is the party who loses.[22]

8.26 The Defence Force Ombudsman also underlined the importance of getting the investigation right. He made the observation that 'if the initial handling, investigation or whatever of a complaint is defective then it establishes a bad platform which is reflected at every subsequent stage of the process…'[23] Mr Neil James, Executive Director, Australian Defence Association, strongly endorsed this view. In his words, 'an ounce of prevention is worth a pound of cure'.[24]

The effectiveness and fairness of administrative inquiries

8.27 The report now considers whether administrative inquiries are fair and proper processes that adequately protect the interests of all parties involved in the inquiry, and, at the same time, effectively gather and analyse the evidence and produce

---

21 *Committee Hansard*, 5 August 2004, p. 21.

22 Report into Military Justice in the Australian Defence Force, conducted by Mr J.C.S.Burchett, QC, An Investigating Officer appointed by the Chief of the Defence Force, under the Defence (Inquiry) Regulations 1985, p. 116.

23 *Committee Hansard*, 9 June 2004, p. 10.

24 *Committee Hansard*, 9 June 2004, p. 32.

recommendations designed to remedy identified problems. It details some of the safeguards built into the system to ensure that basic principles of procedural fairness are observed. It then considers concerns raised in evidence about the adequacy of administrative inquiries.

8.28 The notion of procedural fairness derives from the doctrine of natural justice which relies on fundamental principles intended to ensure the fair treatment of persons. Article 10 of the Universal Declaration of Human Rights proclaims that 'Everyone is entitled to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him'. Article 11, in part, states that 'Everyone charged with a penal offence has the right to be presumed innocent until proved guilty according to the law in a public trial at which he has all the guarantees necessary for his defence'. Although the right to a fair trial has long been established as a fundamental right, its recognition in the Universal Declaration has set a common standard for all peoples and nations. It has provided inspiration for and found expression in a number of international instruments and is now enshrined in Article 14 of the International Covenant on Civil and Political Rights.

8.29 Administrative inquiries are deemed to be different from penal proceedings. One of the most important distinctions between a disciplinary and administrative inquiry is that the investigating officer may make recommendations but cannot determine guilt or innocence or impose a penalty. Hence, adherence to the principles underpinning the right to a fair hearing do not apply with the same force to administrative inquiries. Notably, investigating officer inquiries are not held in public, a person who is subject to adverse comment does not have the right to call or examine people giving evidence, nor does he or she have the right to be present during the taking of evidence. Also members of the ADF must, unless they have a reasonable excuse for declining to do so, answer all questions put to them by the investigating officer and produce any documents or articles.[25]

8.30 It should be noted that the recommendations coming out of an administrative inquiry may form the basis upon which adverse administrative action may follow. Moreover, adverse administrative action may result in severe consequences for an individual including discharge from the ADF. Administrative action is not merely about warnings, fines and extra duties. Thus the fundamental principles underpinning the notion of a fair trial offer a sound and sure guide on important matters that should be observed during an administrative inquiry.

8.31 The Burchett Report was concerned about ensuring that procedural fairness was observed in administrative inquiries.[26] It recommended that 'General policy

---

25 Administrative Inquiries Manual, ANNEX C to Chapter 6, para. 19. Their evidence is not to be taken on oath. Annex E to chapter 6, para. 4.

26 Report into Military Justice in the Australian Defence Force, conducted by Mr J.C.S.Burchett, QC, An Investigating Officer appointed by the Chief of the Defence Force, under the Defence (Inquiry) Regulations 1985, p. 27.

guidance be developed as to the exercise of the command prerogative, and as to the extent and nature of the observance of the dictates of natural justice which is required in connection therewith'.[27]

8.32 In keeping with the principles of natural justice and procedural fairness, the fair hearing and no bias rules apply to administrative inquiries. Indeed, the Administrative Inquiries Manual notes:

> It is important that ADF inquiries comply with applicable standards of procedural fairness and administrative law. The due process aspects of Natural Justice must be observed throughout the inquiry process.[28]

8.33 The following section discusses the rules underpinning natural justice and their application to administrative inquiries.

Procedural fairness—right to know allegations or adverse comment

8.34 One of the main safeguards to ensure a fair outcome in an investigation process relies on the right of persons who are the subject of evidence that reflects adversely on them to put their case. To be in a position to defend their interests, they must have full knowledge of the allegation made against them and the evidence that supports such an allegation. Without access to such information, a person is ill-equipped to test the validity of the evidence before the investigating officer and thus is not in a fair position to rebut allegations or evidence damaging to his or her interests. Matters such as the right to legal advice, to adequate time and facilities to prepare a defence, and the opportunity to present a case are also important considerations in ensuring that an inquiry is both fair and proper.

8.35 The ADF Manual makes clear that before an inquiry can proceed the person against whom allegations or complaints have been made must be made aware of them except where to do so may result in the destruction or removal of evidence.[29] Also any member against whom an allegation or complaint has been made is entitled to know the substance of it, have adequate notice of any adverse evidence and have a reasonable opportunity to respond to any allegation or complaint.[30]

8.36 The Manual is unclear about the timing involved in advising a member of allegations made against him or her. It does, however, make clear that members affected by the report of an investigating officer do not have an automatic right to

---

27 Report into Military Justice in the Australian Defence Force, conducted by Mr J.C.S.Burchett, QC, An Investigating Officer appointed by the Chief of the Defence Force, under the Defence (Inquiry) Regulations 1985, p. 38.

28 Australian Defence Force Publication, Administrative Series, *Administrative Inquiries Manual*, para. 1.37.

29 ibid.

30 ibid., para. 6.34.

access the report. The report of an inquiry conducted under the Defence (Inquiry) Regulations can only be released with Ministerial approval.[31]

8.37 Some witnesses gave evidence that they were not accorded the fundamental right to know the allegations being made and were denied access to material central to the accusations made against them.[32] A number of submitters maintain that investigations concerning them were conducted without their knowledge.[33] One member wrote:

> At no time during or after the investigation did the investigating officer inform me, as required under the **Fair Hearing Rule**, of any adverse evidence or allegations or complaints.[34]

8.38 Many have had to rely on the Freedom of Information (FOI) Act to obtain relevant information. One witness, the subject of anonymous allegations, told the committee that 'the only reason I know where I am at the moment is freedom of information… because it is the only vehicle through which I have been able to find out what is going on.'[35] He explained:

> …I have not been allowed to call witnesses, been properly informed of the existence of key documents relied upon by Defence or been given the opportunity to adequately challenge and redress the injustices perpetrated against my family and me.[36]

8.39 He informed the committee that the Army failed to provide him with the information he requested under the Freedom of Information Act until the investigation was complete and the Minister approved the release of information.[37] In other evidence, Mr Williams related an incident where, 'The first victim was not allowed to stay in the hearing room to hear the evidence given by the sergeant, but the sergeant was present in the room when the young victim was recounting his side of events. The victim told us that the tone of the proceedings was that he was the one at fault.'[38]

---

31 Australian Defence Force Publication, Administrative Series, *Administrative Inquiries Manual*, Annex F to chapter 6, para 8.

32 See for example Ms Jayne Fitzpatrick, *P35,* p.1.

33 Confidential *Submission C15*; Confidential *Submission C37*; Confidential *Submission C39*, p. 1.

34 Confidential *Submission C39*, p. 1.

35 In camera *Committee Hansard*, 10 June 2004, p. 85.

36 In camera *Committee Hansard*, 10 June 2004, p. 82.

37 Confidential *Submission C37*, para. 21.

38 *Committee Hansard*, 28 April 2004, pp. 35–8.

Committee view

8.40 The committee believes that there is no excuse for failing to inform a person alleged to have committed a wrongdoing of that allegation or not providing that person with all relevant material. It notes that the Manual makes clear that investigating officers should observe this principle. Even so, the committee would like to see stronger guarantees in place to ensure that the rights of people subject to adverse reflections are protected. It would also like to see prompt corrective action from an independent body unconnected with the initial inquiry available to people who believe that they have been denied procedural fairness.

Communication and provision of information—Complainants

8.41 Although procedural fairness dictates that a person who is the subject of adverse comment has the right to know the substance of the allegation and the evidence supporting the allegations, there are many other people involved in an inquiry process who believe they also have a right to information, particularly the complainant.

8.42 The Burchett Report referred to the lack of transparency of the outcome of an administrative inquiry and the lack of feedback to complainants or persons affected by the offending conduct. It concluded that 'strong guidelines should be laid down to ensure that persons with a real interest, such as victims and complainants, are not left in the dark as to what was done about an alleged breach of discipline'.[39] It also found that at least some of the long running complaints that have plagued the ADF for years might have been avoided had the complainant, as a victim, been fully enlightened about action taken and the reasons for it at an earlier stage.[40]

8.43 The current manual takes particular note of the attention that should be given to the complainant. It requires that where there is a complainant, the investigating officer should notify that person of the inquiry and the procedures to be followed. It makes the point that an interview with the complainant is important because it helps to clarify the allegations and assists the investigating officer to better understand the nature of the complaint by obtaining specific details about the relevant matters.

8.44 Defence Instructions also require that the complainant be provided with 'meaningful advice of the progress of the investigation into the complaint at appropriate milestones':

---

39 Report into Military Justice in the Australian Defence Force, conducted by Mr J.C.S.Burchett, QC, An Investigating Officer appointed by the Chief of the Defence Force, under the Defence(Inquiry) Regulations 1985, p. 15.

40 Report into Military Justice in the Australian Defence Force, conducted by Mr J.C.S.Burchett, QC, An Investigating Officer appointed by the Chief of the Defence Force, under the Defence(Inquiry) Regulations 1985, p. 105.

> When advised of the latest action taken in relation to the complaint, the member is also informed of when he or she may expect to receive further advice. The commitment to contact the member is to be by a specific date or time, rather than a general undertaking to simply keep the member informed. The member may request at any time to be advised of the progress of the complaint.[41]

8.45 In some instances, it would appear that Defence Instructions were ignored and complainants had trouble in obtaining information about the progress of their complaint.[42] Indeed, some witnesses underlined the same shortcomings identified in the Burchett Report. Again and again, the committee heard stories about the problems that members of the ADF or their relatives experienced in understanding the military justice system and navigating their way through what appeared to many an unfathomable maze.[43] Their difficulty in trying to explain to the committee the administrative processes involved in their particular cases indicates the complexity of the system. One of their main difficulties was obtaining relevant information and 'meaningful advice' from the investigating officer.

8.46 One witness, who alleged she had been sexually harassed in the workplace and consequently the subject of victimisation and ostracism due to submitting a formal complaint, stated that she had not received progress reports at the stipulated intervals. Furthermore she did not receive a copy of the Quick Assessment which was 'conducted without my knowledge.'[44] Another ADF member, who had reported the use of illegal drugs in his unit, observed that 'we were never kept informed as to what the investigative procedure was and how they were going to go about it'.[45]

8.47 Some members who had lodged complaints also felt that they had not been adequately consulted about their grievance. One witness who submitted a complaint informed the committee that she had not been interviewed during the quick assessment despite making clear that she wanted to be 'continuously informed of processes and procedures being undertaken'. Another complainant also noted that he had not been interviewed by the investigating officer or given the opportunity to respond to statements.[46]

Committee view

8.48 Complainants should be confident that their grievance has been taken seriously and properly investigated. Any deficiency in these areas may sour their

---

41 Defence Instructions (General) PERS 34-1, Redress of Grievance-Tri-Service procedures, Annex E, para. 11.

42 Confidential *Submission C1*.

43 See for example, Ms Jayne Fitzpatrick, *Submission P35.*

44 Confidential *Submission C1*.

45 In camera *Committee Transcript*, 29 April 2004, p. 20. Confidential *Submission C1*.

46 Confidential *Submission C25*, para. 12.

perceptions of the administrative processes. Without doubt, the evidence shows that many people are disappointed with this aspect of administrative inquiries and that the ADF must improve the way it communicates with complainants.

Confidentiality

8.49 In 1998, the Defence Force Ombudsman questioned whether the ADF pays sufficient attention to the need for confidentiality and privacy to be respected when dealing with member's complaints. She found 'some suggestion that information relating to an incident had been provided to, or sought from, individuals who did not have a right to know. She observed that, while the guidance was clear on this matter, it was not 'always adhered to'.[47] Six years on, the committee heard of a number of instances where allegations still under investigation became publicly known.[48]

8.50 The committee believes that observing the right to privacy is an important aspect of the administrative system that the ADF should improve.

Conflicts of interest and the independence of the inquiry

8.51 The credibility of any inquiry process rests heavily on the actual and perceived impartiality of those conducting the inquiry. The *Administrative Inquiries Manual* recognises the importance of upholding the no bias rule. It states unequivocally that the person or persons selected to conduct an investigating officer inquiry:

> …must be free from bias and conflict of interest. Subject to these constraints and providing that they are not directly responsible in the chain of command for the personnel or activities under inquiry, a member of the same unit may be selected.[49]

8.52 The manual explains that a commanding officer, who by definition is likely to be involved in the implementation of recommendations with respect to members under their command, is not to be appointed to investigate the conduct of any member

---

47 Commonwealth Ombudsman, *Own motion investigation into how the Australian Defence Force responds to allegations of serious incidents and offences: Review of Practices and Procedures,* report of the Commonwealth Defence Force Ombudsman pursuant to section 35A of the Ombudsman Act 1976, paras 8.54–8.56.

48 Confidential *Submissions C15, C37* and *C39*.

49 Australian Defence Force Publication, Administrative Series, *Administrative Inquiries Manual*, para. 5.10. This advice is offered more than once in the Manual, for example para. 1.24(b) reads, 'Personnel selected to participate in an inquiry must be free, to the maximum extent feasible, from any suggestion of bias or conflict of interest involving any issue or witness. Where practicable, an inquiry should be conducted by personnel who are not in the immediate chain of command of the personnel under inquiry. However, a member of a unit in the direct chain of command of the appointing authority may be selected provided they have no direct or indirect involvement in the matters under inquiry and are not likely to be involved in the implementation of the recommendations.'

under their command.[50] It directs investigating officers to 'avoid being improperly influenced by particular witnesses' and advises that, 'regardless of personal feelings, an Investigating Officer must keep an open mind at all times'.[51]

8.53 The manual also provides specific advice on inquiries into unacceptable behaviour. It recognises that such matters require particular skills and approaches. It suggests that maturity and sensitivity are necessary but most notably that the inquiry should be seen to be and actually be free from bias. It states:

> …where it is practical to do so, consideration should be given to appointing an officer from a unit other than that to which the personnel under inquiry belong. If a suitably qualified officer can not be identified, the Appointing Officer should consult their superior authority.[52]

8.54 It reinforces this directive by adding that one of the principal criteria to be taken into account when selecting personnel to inquire into allegations of unacceptable behaviour is 'that personnel who are direct supervisors, personnel who have a close working relationship or a friendship with any of the parties or witnesses should not be involved.'[53]

8.55 Despite this guidance, one of the most persistent concerns raised by witnesses involved conflicts of interest and the perceived unfairness of the investigation process. Any perception that an ADF inquiry lacks objectivity and impartiality undermines the integrity of the whole military justice system. Previous reports have also identified the apparent lack of independence of the investigating officer as a source of criticism.

8.56 Lieutenant General Leahy assumed that when he gave an investigating officer the appointing authority and the terms of reference that the officer would 'answer that impartially'.[54] He accepted that 'in nearly every instance the investigating officer will know of, or perhaps has been associated with, the person that he is investigating.' Having said that, Lieutenant General Leahy offered the following assurance:

> We do many of these investigations. I am not aware of anyone who has called into question the objectivity of the individual, the investigating officer, to say that he is [not] impartial.
>
> …It is not something that is of primary concern to me, because I expect impartiality from my officers. If the officer who is assessed feels that impartiality is not present, he has very clearly open to him a whole range of further redresses.[55]

---

50 ibid., para. 5.10 and footnote 4 on p. 5–2 of the manual.

51 ibid., para. 6.36.

52 ibid., para. 5.11.

53 ibid., para. 1.15.

54 *Committee Hansard*, 5 August 2004, p. 8.

55 ibid.

8.57 He reiterated his conviction:

> Officers know each other. But I also take it implicitly that if I give a job to an officer he is going to carry it out impartially and properly and will not be prejudiced by his knowledge of the other officer. And, if he is, he will come to me and say, 'I don't think I'm the right guy to be doing this. Get someone else.'[56]

8.58 When asked what could be done if adherence to this standard did not occur, he replied that the complainant:

> … can go to the next level using the redress process to say, 'That bloke is dodgy. He and I had a spat in Timor three years ago and I don't think he should be making those judgments.'[57]

8.59 Evidence before the committee clearly shows that many do not share Lieutenant General Leahy's confidence. The belief that ADF officers will acknowledge a potential conflict of interest and act appropriately and that complainants have the wherewithal to challenge the appointment of an investigating officer on the grounds of a conflict of interest is admirable. It does not, however, necessarily reflect the reality of people's experiences.

8.60 An environment where leaders in the chain of command naturally want to protect themselves and their careers by not having attention drawn to problems under their command creates a situation where conflicts of interest are bound to emerge where investigations are conducted 'in-house'. [58] One witness argued that a system that self-manages its discipline without outside accountability is seriously flawed. He was of the view that:

> …subordinates will always be inclined to agree with those more senior than them. Members of the military will never be able to properly investigate other members of the military. I strongly believe that the intensely hierarchical nature and relatively small size of the services makes it impossible for each one to investigate itself.[59]

8.61 Another stated his belief that 'the practice by members of the Chain of Command keeping things in-house to avoid damage to its reputation and career prospects is commonplace in the military'.[60]

8.62 Consistent with this view, another former ADF member stated:

> The bottom line is really quite easy to state: the Defence Force—be it Navy, Army or Air Force—cannot investigate itself on the one hand and defend

---

56 ibid., p. 26.

57 ibid., p. 26.

58 Confidential *Submission C43*.

59 Confidential *Submission C8*, p. 2.

60 Confidential *Submission C43*, para. 3.

> itself on the other. This simply cannot be done fairly, without bias, thoroughly or properly. Do I feel that cover-ups are occurring? Again the answer is yes. I have no doubt whatsoever in my mind that this is the case. Whilst the Defence Force continues to investigate itself, this will continue to be the case.[61]

8.63 These general observations are drawn from personal experiences with the administrative system and are supported by a number of witnesses who conveyed to the committee the details of their particular case.[62] Mr Nigel Southam asserted that his CO was not impartial. In his redress of grievance lodged with his commanding officer, Mr Southam made allegations of mistreatment of himself and others under the CO's command. He maintained:

> In this case, he [the CO] personally decided to keep things 'in house' so that he could control the investigation himself and determine the outcomes to suit his purposes. This led to his personal bias in all aspects of this complex case and he became too personally involved, as did his RSM who laid the charges…he was protecting a newly formed 1MP Bn as the first ever CO1 MP Bn and his intention was to ensure that it worked without airing any negative issues to his superiors. [63]

8.64 He informed the committee that, when he was told by his CO that the CO would hear his case, he 'put up a stink through my lawyer and indicated that he was biased'. As a consequence, 'the CO pulled out and let the CO1 Int Battalion take it over'.[64] Members do not always have the support, knowledge or fortitude to take such a stand. Even so, Mr Southam suffered a psychological breakdown which he attributed to the ineffective procedures in pursuing his complaints and with continued harassment.[65] He told the Committee :

> These [procedures in pursuing his complaints] have caused me to be medically discharged as a result of psychological issues, and I have attempted suicide along the way after some three years of trying to find some resolutions in relation to these submissions.[66]

8.65 The committee notes that in his efforts to pursue his case, Mr Southam made a submission to the committee, attended and gave evidence at a public hearing and remained in regular contact with the committee during its inquiry. The committee was advised on 12 August 2004 that Mr Southam had died suddenly in a road accident.

---

61 In camera *Committee Hansard*, 29 April 2004, p. 4.

62 For example, Confidential *Submissions C25A* and *C29*.

63 *Submission P19*, pp. 3, 4.

64 *Committee Hansard*, 9 June 2004, p. 69.

65 *Submission P19,* p. 4.

66 *Committee Hansard*, 9 June 2004, p. 664.

8.66 Another witness who was advised to use the available process to submit a complaint argued that this would have entailed addressing the grievance directly to the person against whom the grievance was made. He suggested that 'The resulting "Caesar looking at Caesar" scenario would have been meaningless, with a predictable non-productive outcome.'[67] Legal advice obtained by another complainant suggested that, 'although the person appointed as the investigating officer ought to have been aware of a reasonable apprehension of bias, he failed to refuse the appointment'.[68] Similarly, Ms Jayne Fitzpatrick noted:

> Internal unit investigations achieve little where the complaint is against a senior member of the unit. My complaints expanded to include the CO and Chief Clerk in regard to their inappropriate behaviour. It became a farcical situation when the CO was investigating himself and the RSM was calling members to his office to write their statements about his behaviour…[69]

8.67 She joined the many other witnesses who called for independent investigations. In her mind such investigations 'may lend credibility and allow for a two way passage of information more readily than the closed door policy of the military justice system'.[70]

8.68 Mr Nigel Danson was also looking for greater independence and impartiality in the investigation processes. He complained about unacceptable treatment by various supervisors and senior officers, which included belittlement and continual harassment, while serving with the Air Force in East Timor. In his submission he claimed that he 'only ever wanted the members to be held responsible for their actions'. He came to the conclusion, however, that 'justice will never happen due to the rank of who the complaints were against and the current procedures for these investigations'.[71] He held the view that:

> The only way I can see the problem of Officers investigating other Officers of the same mustering and rank, but returning a fair and legal decision is to totally remove the investigation process from the same branch of each Defence Force.[72]

8.69 He suggested further that a civilian representative be included in the investigation chain of command that could report direct to the Defence Department to present an objective point of view and show accountability.[73]

---

67 Confidential *Submission C51*.

68 Confidential *Submission C39*, Attachment.

69 *Submissions P35* and *P3*.

70 ibid.

71 *Submission P11,* p. 2.

72 *Submission P11*, p. 2. See also Michael Pembroke Prowse, *Submission P12*, p. 3.

73 *Submission P11*, p. 2.

8.70 The above accounts represent only a fraction of the total number of witnesses who voiced their concern about the potential lack of independence and the perceived conflict of interest that exists where the military investigates itself.[74]

8.71 This perception that there is real pressure on Service personnel to put other priorities before that of securing a fair and just investigation leaves the military justice system open to criticism. The many witnesses who expressed concerns about the lack of independence speak with one voice in calling for an independent adjudicator so that a neutral and unbiased investigation can take place free from third party interference.[75]

8.72 The JSCFADT reached similar conclusions about the potential for conflict of interests. It recommended that 'Investigating Officers should be appointed from outside the chain of command of the individual(s) or element immediately under investigation and should not be personally acquainted with any of the parties involved in the incident.'[76]

8.73 In response to this recommendation, the government agreed in part and, as noted above, the Manual now offers guidance on this matter. The government was of the view, however, that it would not be possible to implement the second part of the recommendation that requires the investigating officer not to be acquainted with the individuals under investigation on the grounds that this would be impractical.[77]

8.74 It should be noted that a number of witnesses agreed that, in straightforward cases, the administrative system performs well. For example one witness stated:

> …in minor cases, such as a drunken soldier being late for work, the system probably operates reasonably.

He noted, however, that:

> Where the power relationship is in any way challenged at the higher level—in instances of loyal opposition, for example—the soldier has no protection.[78]

---

74 See also Mrs Satatas, *Committee Hansard*, 28 April 2004, pp. 1–3; Mr David Richards, *Committee Hansard*, 9 June 2004, p. 35.

75 See also Ms Screaton, *Submission P31*, pp. 1, 3 and 4. She refers to her husband's redress of grievance dealing with the events that took place on board HMAS *Kanimbla* in regards to the Anthrax Vaccination program. In her view the process of her husband's redress of grievance system was seriously flawed and the system 'should not be held within the Defence force but held by an independent body that way the outcomes will be true and final'. Ms Jayne Fitzpatrick *Submission P35*; *Submission P38*, p. 39; and Confidential *Submission C50*.

76 Report into Military Justice in the Australian Defence Force, conducted by Mr J.C.S.Burchett, QC, An Investigating Officer appointed by the Chief of the Defence Force, under the Defence(Inquiry) Regulations 1985, p. 117.

77 Government Response to the Report on Military Justice Procedures in the Australian Defence Force, pp. [11–12].

78 In camera *Committee Hansard*, 10 June 2004, p. 31.

Committee view

8.75 The committee makes no judgement about whether the independence of the investigating officer was compromised in any of the incidents related above. It is clear, however, that the present arrangement certainly allows, at the least, a perception of bias to undermine the integrity of the administrative inquiry process. It believes that the ADF must do more to address this problem and to eliminate this perception.

8.76 The committee notes the steps taken by the ADF following the recommendations made by the JSCFADT. It believes that stronger measures are necessary. Guidance offered in a Defence manual will not convince people that such advice will effectively counter service loyalty and/or self interest especially where the language is not sufficiently direct.

8.77 In particular, the committee recommends that stronger measures be taken to ensure the actual and perceived independence of the investigating officer and appointing officer. The committee is firmly of the belief that there are circumstances where a person should not be appointed as an investigating officer or where circumstances arise during the inquiry that should require him or her to withdraw automatically as the investigating officer of an inquiry. It suggests that the ADF revise and strengthen the language in their Manuals to ensure that due process is guaranteed to all ADF members involved in an investigation. For example, sub para 5.15(b) should read 'that personnel who are direct supervisors, personnel who have a close working relationship or friendship with any of the parties or witnesses must not be involved in an investigating officer inquiry'.

Recommendation 27

8.78 The committee recommends that the language in the Administrative Inquiries Manual be amended so that it is more direct and clear in its advice on the selection of an investigating officer.

8.79 Mindful that the meaning conveyed in the Manual about the importance of appointing an impartial investigating officer is clear, the committee is concerned that strengthening the language may still not be an adequate safeguard to ensure the independence of an investigating officer. The Manual is intended to provide advice and guidance.[79] It therefore recommends further that the guidance offered in the Manual be drafted as regulations to be inserted in Part 6 of the Defence (Inquiry) Regulations 1985.

8.80 There are also a range of options available to help remove the perception of conflict of interest by making the system more accountable and the appointment of investigating officers more transparent.

---

79 Australian Defence Force Publication, Administrative Series, *Administrative Inquiries Manual* Foreword, para. 2.

Recommendation 28

8.81 The committee recommends that the following proposals be considered to enhance transparency and accountability in the appointment of investigating officers:

- **Before an inquiry commences, the investigating officer be required to produce a written statement of independence which discloses professional and personal relationships with those subject to the inquiry and with the complainant. The statement would also disclose any circumstances which would make it difficult for the investigating officer to act impartially. This statement to be provided to the appointing authority, the complainant and other persons known to be involved in the inquiry.**
- **A provision to be included in the Manual that would allow a person involved in the inquiry process to lodge with the investigating officer and the appointing officer an objection to the investigating officer on the grounds of a conflict of interest and for these objections to be acknowledged and included in the investigating officer's report.**
- **The investigating officer be required to make known to the appointing authority any potential conflict of interest that emerges during the course of the inquiry and to withdraw from the investigation.**
- **The investigating officer's report to include his or her statement of independence and any record of objections raised about his or her appointment and for this section of the report to be made available to all participants in the inquiry.**

8.82 Having clearly enunciated the measures that an investigating officer must take to ensure that any person subject to an investigation is afforded procedural fairness is only the first step. There must be an independent oversight body with the responsibility and authority to ensure that the measures are enforced. The proposed Australian Defence Force Administrative Review Board should provide this necessary oversight (see recommendation 29, para 11.67).

Competence of the Investigating officer

8.83 A fundamental principle underpinning the right to a fair hearing is that everyone is entitled for such a hearing to be held by a competent, independent and impartial body established by due process. The committee believes that, although an administrative inquiry is not a judicial process, it should nonetheless guarantee that any inquiry will be conducted by a competent body.

8.84 Lieutenant General Leahy looked to the training and education of officers as an indication of the level of competency attained by investigating officers. He stressed that the training is inherent in the upbringing of an officer:

> The training is as an investigating officer, his duties and responsibilities are through the Royal Military College conducting lower level investigations as a young officer at the staff college and at other colleges that he attends and,

> again, at the precommand course what needs to be done as an investigating officer.
>
> …a user's guide is always available to these officers, and we expect that they use that guide. [80]

8.85 Similarly, Air Marshal Angus Houston explained:

> …those posted to command positions in the Air Force undergo specialised training in the roles and responsibilities of command. This training includes the military justice system, its procedures and its application to our people. To support them in fulfilling their command obligations, they are also provided with specialist administrative and legal support to ensure they carry out their command responsibilities within the framework of both discipline and administrative law.[81]

Clearly, the service chiefs believe that investigating officers are well trained and competent.

8.86 Despite the training process for officers in undertaking inquiries, many witnesses held an opposing view on the competency and level of training of investigating officers.[82]

8.87 In 1998 the Commonwealth Ombudsman in her review of the practices and procedures of ADF investigations, found a number of commonly occurring problems in ADF investigations, particularly administrative investigations of personnel-related issues. They included:

- inadequate planning of investigations;
- failure to interview all relevant witnesses and assumptions made about the credibility of witnesses interviewed;
- pursuit of irrelevant questioning techniques and failure to put contradictory evidence to witnesses for a response;
- failure to record evidence properly, and possibly, preparation of witnesses and unauthorised questioning of witnesses;
- failure to analyse evidence objectively, and to weigh evidence appropriately, thereby leading to flaws in the way conclusions were drawn and findings made; and
- inadequate record keeping.[83]

---

80 *Committee Hansard*, 5 August 2004, p. 15.

81 *Committee Hansard*, 1 March 2004, p. 44.

82 See for example, Ms Jayne Fitzpatrick, *Submission P35*, p. 3 and confidential attachment to *Submission P40*.

8.88 The ADF took note of the Ombudsman's findings and formed a working party to develop an ADF-wide training strategy and guidance on Defence Inquiry Regulations and to set about drafting a new inquiries and investigation manual.[84]

8.89 Six years later, however, the Defence Force Ombudsman was again highly critical of the poor standard of administrative investigations. He informed the committee that his office had seen instances in which investigations had been undertaken by people with inadequate training and, in some cases, the investigation was not as professional as it should have been.[85] He noted in particular the following deficiencies which, he said, in large measure reflected the poor training and lack of experience and expertise in investigations identified six years earlier:

- investigations of serious allegations being carried out by officers with apparently inadequate training in investigations and approaches inappropriate for the allegations being investigated;
- an investigation being thorough but conclusions and recommendations not being drawn together logically from the evidence for the decision-maker;
- an investigation taking an inordinate length of time with changes in investigation officer and failure to address the substance of the complaint;
- investigations resulting in recommendations which appear never to have been considered by anyone with the appropriate authority;
- an investigation where the members of the public are questioned with little apparent thought for the potential consequences; and
- investigations which have taken so long it renders any outcome favourable to the member virtually meaningless.[86]

8.90 A number of witnesses who described their experiences of an investigation process concur with the Ombudsman's general observations. Two submissions, in particular, dealing with allegedly fraudulent activity, indicate a lack of thoroughness

---

83 Commonwealth Ombudsman, *Own motion investigation into how the Australian Defence Force responds to allegations of serious incidents and offences: Review of Practices and Procedures,* Report of the Commonwealth Defence Force Ombudsman pursuant to section 35A of the Ombudsman Act 1976, January 1998, paras 37 and 5.54.

84 In her report, the Ombudsman noted that the ADF had formed a team, known as the Ombudsman Implementation Team which had developed 'a comprehensive draft manual intended for release in 1998 which incorporated many of the recommendations. Commonwealth Ombudsman, *Own motion investigation into how the Australian Defence Force responds to allegations of serious incidents and offences: Review of Practices and Procedures,* Report of the Commonwealth Defence Force Ombudsman pursuant to section 35A of the Ombudsman Act 1976, January 1998, statement following para 61.

85 *Committee Hansard*, 9 June 2004, pp. 1–4; *Submission P28*, p. [3].

86 *Submission P28*, p. [3].

on the part of the investigating officer, especially the failure to ask the most basic questions, to interview key witnesses, and to establish relevant facts. They maintained that there was unprofessional, even unethical, conduct in pursuing and conveying information, and scant regard for confidentiality or privacy matters.[87] Legal advice obtained by another member contended that, among a raft of failings, the investigating officer did not comply with certain mandatory procedures imposed on an investigating officer, including the failure to obtain all evidence that was practicable to obtain.[88] It also advised that the investigation was in breach of legislation such as the Freedom of Information Act, the Privacy Act and the Defence (Inquiry) Regulations.

8.91 Group Captain Behm, who had been appointed the investigating officer for a number of inquiries, suggested that the majority of investigating officers may not have appropriate training.[89] In his own assessment, he maintained that he had very limited experience as an investigating officer. With regard to his first investigation, he stated 'my legal assistant at the time gave me a lot of hands-on skill and training. It was basically learning on the job'.[90]

8.92 Mr Earley, IGADF, also identified a lack of understanding of procedural fairness in the conduct of investigations. He stated that the awareness of procedural fairness obligations in administrative inquiries was 'probably less than desirable, and we need to concentrate a bit more on that'.[91]

8.93 The ADF has taken note of the Burchett Report recommendation that a register of suitable persons to act as investigating officers under the *Defence (Inquiry) Regulations* be developed.[92] In August 2004, Mr Earley told the committee that, as well as the establishment of a Register of Inquiry Officers, the ADF was trying to improve the training of investigating officers. He explained further:

> The initial course will happen next month for 25 people. The intention is to run it about four times a year. Over a period of time—and it will not happen overnight—we would expect the general standard of people conducting administrative inquiries to be substantially improved as a result of that. [93]

8.94 The committee takes account of Mr Earley's view that the new training course together with revisions to the manual should improve the level of competency in

---

87 Mr Geoff Lewis, *Submission P55*, pp. 3–4 and Confidential *Submission C37*, para. 15.

88 Confidential *Submission C39*. See also *Submission P9A*, p. 2.

89 *Committee Hansard*, 22 April 2004, pp. 4–5.

90 *Committee Hansard*, 22 April 2004, p. 5.

91 *Committee Hansard*, 5 August 2004, p. 99.

92 Report into Military Justice in the Australian Defence Force, conducted by Mr J.C.S.Burchett, QC, An Investigating Officer appointed by the Chief of the Defence Force, under the Defence (Inquiry) Regulations 1985, p. 118.

93 *Committee Hansard*, 5 August 2004, p. 99.

investigating officers.[94] Even so, it notes that in 1998, following the Ombudsman's own motion inquiry, the ADF undertook to develop a training program and to produce a new investigation manual. Clearly, those initiatives have not worked. In light of the failure of past initiatives, the committee believes that a close watch is needed to ensure that the proposed training and other initiatives produce the desired results. The committee's proposed Australian Defence Force Administrative Review Board should have an active role in monitoring the effectiveness of these initiatives (see recommendation 29, para 11.67).

Committee view

8.95 Undoubtedly, the investigating officer is in a position of great influence in the management and direction of an inquiry. He or she determines whether a particular fact or piece of evidence is relevant to the inquiry and the weight that should be assigned to it. The investigating officer has the responsibility to test the veracity of evidence and ensure that all relevant material has been considered.[95] Furthermore, keeping in mind that it is the investigating officer who will be possession of the information, the onus falls on him or her to ensure that all parties are treated fairly, their privacy respected, and that all people involved in the proceedings are afforded procedural fairness.

8.96 The importance of having an impartial, well-trained, competent and experienced investigating officer is heightened when considering the degree of discretion held by that person and the lack of transparency and accountability of the administrative inquiry process—particularly, the closed nature of its proceedings and the limited distribution of its report. Indeed, one of the main problems with in camera proceedings is that the absence of public scrutiny does not encourage witnesses to come forward to present evidence truthfully and does not allow questioning of the evidence gathering, the assessment of that evidence and the findings. Any steps taken to open the window on administrative proceedings, while still respecting the privacy of people involved in the inquiry, would be welcome. But more importantly, the qualifications and training of investigators must be of a standard to ensure that they are able to conduct a proper and fair investigation. This is clearly not the case at the moment. The establishment of a pool of highly qualified investigators must be one of the ADF's most important military justice priorities.

8.97 The IGADF is currently developing a training program designed to improve the competence of investigating officers. The committee welcomes this initiative and has recommended that its proposed Australian Defence Force Administrative Review Board, an independent review body for military grievances and complaints, further develop and implement the program (see recommendation 29, para 11.67).

---

94 *Committee Hansard*, 5 August 2004, p. 100.

95 Australian Defence Force Publication, Administrative Series, *Administrative Inquiries Manual*, Annex E to Chapter 6, para. 2.

Assistance to investigating officers

8.98 Group Captain Behm was from the school of opinion that appreciated the importance of having investigating officers who have had 'operational experience and wide experience in their military discipline'.[96] He concluded:

> It is very important for an investigating officer to have a background in administration, operational things or human resource management. I am not saying that an investigating officer necessarily needs to be trained as an investigator. I think those sorts of things, if he is not trained as an investigator, presuppose that the legal support that the investigating officer gets will cover those issues.[97]

8.99 As noted by Group Captain Behm, the matter of competency in conducting an investigation also relies on the provision of necessary expert advice to the investigating officer. As an officer who had been appointed an investigating officer for a number of inquiries, he expressed concern about the availability of legal advice for the investigator. He held that there:

> …is a disconnect between the right of an appointing authority to appoint an investigating officer and determine the methodology of that inquiry and the power of the Defence Legal Service to refuse to exercise the financial delegation to pay any legal officer appointed by Command under the defence inquiry regulations, as it did in this case. It is my view that there is potential for the Defence Legal Service to undermine the decision of a commander from running an inquiry as he sees fit just by refusing to provide or pay the legal advisor.[98]

8.100 From personal experience, he cited a case where the Defence Legal Service (TDLS) denied the appointing authority the legal assistance he required. The appointing officer was advised that the tasks outlined 'were administrative rather than legal in nature and tasked for the investigating officer to undertake'. He argued:

> The Defence Legal Service was prepared to make a legal officer available on an ad hoc basis, to answer over the phone any legal questions I may have had. It saw no need for the legal officer to be on hand or to participate in the interview of key witnesses. The Defence Legal Service approach presupposes that I can identify that I have a legal issue and that I know what legal question to ask. The ad hoc legal advisor would not be apprised of the issues being investigated or the evidence collected and would be required to give legal advice in a vacuum. The Defence Legal Service approach does not allow for the strategic management of an inquiry.

8.101 He concluded:

---

96 *Committee Hansard*, 22 April 2004, p. 13.

97 ibid., p. 13.

98 *Committee Hansard*, 22 April 2004, pp. 2–3.

> The ultimate result was that I, as an investigating officer, was not provided with legal advice which was independent of Command and there was interference by Command in the conduct of my inquiries.[99]

8.102 He recommended that consideration be given to the provision of legal support to appointing officers and investigating officers pursuant to the Defence (Inquiry) Regulations, and that appointing officers have the authority to determine the level of legal support to be made available to investigating officers of the TDLS.[100]

8.103 The committee notes this criticism of TDLS and acknowledges the important role that appointing authorities should have in determining whether legal assistance should be provided. The provision of legal assistance is a matter of procedural fairness and should be assessed objectively and with natural justice as a primary consideration.

Delays

8.104 Any disruption to an inquiry has the potential to affect the quality of evidence gathering as well as to cause unnecessary hardship for both the complainant and persons subject to allegations. A prolonged inquiry adds to the ordeal of those wanting information about a sudden death or an accident or those seeking redress of a complaint. Also, while waiting for the result of an inquiry, those facing the prospect of adverse administrative action may have their reputation tarnished, their career prospects and health damaged or suffer financial loss. This has been the case in many instances presented to the committee.

8.105 As a precaution against delay, the appointing officer, in planning an inquiry, is to determine the time expected to complete the inquiry including setting a specific date for submitting the final report. He or she must monitor the progress. The Administrative Inquiries Manual stipulates that:

> A progress report will demonstrate that the scope of the inquiry is being kept under constant review and will advise the Appointing Officer of any difficulties encountered—will explain why the inquiry could not be completed in the time allocated and justify a specific extension of time for the completion of the inquiry and final report.[101]

8.106 Even so, one of the most persistent criticisms levelled at the investigation phase was the length of time taken to complete the process.[102] Hold-ups may occur at the initial stage of an administrative inquiry—the quick assessment. According to the

---

99 *Committee Hansard*, 22 April 2004, pp. 2–3.

100 *Submission P25*, p. 2.

101 Australian Defence Force Publication, Administrative Series, *Administrative Inquiries Manual*, para. 6.16.

102 See Mrs Satatas, described the process as very slow and that a long time elapsed before an investigation was started, *Committee Hansard*, 28 April 2004, p. 12. Unnecessary delays also cited in Confidential *Submissions C2*, *C8*; *C29* and *C37*.

Australian Peacekeeper & Peacemaker Veterans' Association (APPVA), the military justice system is far too slow in undertaking inquiries into whether administrative action or disciplinary action should be taken against an individual. It noted that a number of APPVA members have reported waiting long periods of up to eighteen months, for decisions to be made.[103]

8.107 Lieutenant General Leahy conceded that delays have dogged the system for many years. He explained:

> Delay is not always the result of institutional mismanagement or bureaucratic bungling, nor should it be assumed as such. Most service police investigations and administrative inquiries in the Army are conducted efficiently, expeditiously and to the satisfaction of all parties involved. When there is delay, this is often the result of complexity and the volume of work asked of our military justice team. Our desire to ensure the processes are fair and just sometimes adds to that delay. But we cannot afford to deny natural justice to anyone in the name of haste.[104]

8.108 The experience of many witnesses does not marry with this observation. Some witnesses saw delay as yet another tactic to frustrate the inquiry process in the hope that the complainant would go away. Mr Dean Wirth, who initially made a report in regard to a harassment complaint in October 2002, had not received any formal resolution by March 2004. He was of the view that he had been directly obstructed in obtaining a resolution to this situation:

> …I am of the opinion that those who are supposed to deal with this have taken the attitude that out of sight out of mind, and that they knew I was discharging due to this harassment. So they have played the waiting game until I discharged, and now they are using the good old red tape excuse to delay even more.[105]

8.109 Mr Southham was informed that the investigation into his complaint, initially dated 1 October 2001, might be completed sometime in April 2004—'over 2½ years'.[106]

8.110 Often delays formed only one part of a baffling pattern of obfuscation and stalling which left witnesses confused and frustrated. Based on personal experiences, Mr David Down, who claimed he was subjected to harassment and sexual assault while in the Navy, noted that:

> …eventually the victims get out either by being discharged as unsuitable or dishonourably. Due to the affect that the events have on their personality and performance, or in the extreme by suicide. This leaves the perpetrators

---

103 *Submission P42*.

104 *Committee Hansard*, 1 March 2004, pp. 29–30.

105 *Submission P41*, p. 1.

106 *Submission P19,* p. 4.

> to continue their career and evil ways which perpetuates the cycle of violence.[107]

8.111 In support of this assessment, another witness who had been through the strain of pursuing a complaint understood how a person's resolve is worn down by stress and subtle pressure and how he or she would give up as a result of having been 'delayed to death by the military justice system.'[108] Another witness who had experienced the difficulties—delay, lack of information, and confusion about the procedure—surmised:

> Imagine an ordinary soldier: most of these kids cannot handle all this kind of stuff …The diggers are just overwhelmed by this.[109]

8.112 Those subject to allegations may also endure long periods of uncertainty and anxiety. One witness, after four years of being the subject of an investigation, has yet to be formally advised of the outcome. To his mind, the delay clearly rests with the Army which:

> …has at great time and expense afforded itself every opportunity to bring a case against me. It has had lawyers repeatedly review decisions and has employed a dysfunctional process that contravenes the fundamental human rights of justice delayed is justice denied.[110]

Committee view

8.113 Delays lead to disappointment which often fuels a growing resentment especially for those already feeling aggrieved. Often this dissatisfaction taints future proceedings. Protracted investigations may also cause unnecessary distress to those involved in the process and have a detrimental effect on their mental health. The committee notes Lieutenant General Leahy's concern that 'the ADF cannot afford to deny natural justice to anyone in the name of haste'. The committee cannot accept, however, that the nature and length of delays chronicled in this report are due solely to the requirement to adhere to the principles of procedural fairness. Missing or misplaced documentation, poor record keeping, recourse to the Freedom of Information legislation, conflicts of interest, lack of support in processing a complaint, investigating officers who lack the necessary skills, experience or training to conduct a competent inquiry all contribute to unnecessary delays. Steps must be taken to correct this problem of delay.

8.114 With this objective in view, the committee recommends that all complaints lodged with a CO and being investigated within the chain of command be referred to

---

107 *Submission P61*, p. 4.

108 Confidential *Submission C43*.

109 In camera *Committee Transcript*, 10 June 2004, p. 96.

110 In camera *Committee Hansard*, 10 June 2004, p. 82.

the proposed Australian Defence Force Administrative Review Board if the matter is not resolved 60 days from lodgement (see recommendation 29, para. 11.67).

Reprisals for providing evidence

8.115 The last chapter noted that, in some cases, the threat of reprisal or actual retaliation deters members from lodging a complaint (paras 7.39–7.59). The committee heard reports of the same type of behaviour occurring should a person decide to lodge a complaint and/or provide evidence during an investigation.[111] One witness told the committee of repeated unacceptable behaviour involving public humiliation and ostracism toward her on account of her pursuing a complaint. She submitted that the unfair treatment was allowed to go unchecked despite investigations.[112] In her formal complaint, she recorded that:

> Part of my chain of command…did not make any corrective actions to alleviate the victimisation and harassment I was experiencing, despite being advised of the severity of the issues and my health problems on a number of occasions.[113]

8.116 She noted that this lack of action was a failure to adhere or abide by DI(G) PERS 35–3 which states:

> Any measure aimed at resolution must include steps to ensure there is no repeat of the behaviour or victimisation of either party. Regular follow-up action must be undertaken by the chain of command to ensure that the behaviour has not been repeated and/or victimisation has not resulted.[114]

8.117 The committee also heard allegations from a case officer assigned to assist a complainant who was also subject to victimisation. He alleged:

> I have been unfairly treated and harassed by staff…for protecting and supporting a whistleblower. I have been subject to unpleasant comments and incidents and accused of being a troublemaker by staff including my peers for associating with [the whistleblower]. My Commanding Officer …stated that 'overwhelming evidence indicated that I was a problem…and that staff are out to get me.'[115]

8.118 An alarming case of intimidation and physical abuse was also reported to the committee by a member who had given evidence before a Defence inquiry.[116] This

---

111 Confidential *Submissions C29, C43*, para. 5 and *C50*. See also *Submission 61*, p. 2. in which Mr David Down stated that he declined to give evidence in a case against a Chief Coxswain who was alleged to have molested a junior sailor because 'of the shame of the other incidents [he had also claimed to have been assaulted] and my fear and anxiety of the consequences'.

112 Confidential *Submission C1*, p. 1.

113 Confidential *Submission C1*, p. 1 and Attachment—Formal Complaint, October 2001.

114 ibid.

115 Confidential *Submission C2*, pp. 2–3.

116 Confidential *Submission C36*.

evidence builds on that cited by the committee in the previous chapter and highlights the extent of the problem. It further underlines the need for the ADF to take a strong stand against this type of conduct.

8.119 Defence Regulations and Instructions clearly spell out the procedures to be followed to ensure the impartiality, fairness and timeliness of inquiries. One witness who complained about a number of process deficiencies following the lodgement of her complaints acknowledged that, while there are well-developed policies and procedures in place, 'The RAN…appear unable to manage real events or follow their own directions'.[117]

8.120 Evidence before the committee supports this observation, which applies across the three services, and highlights the need for ADF to go much further than reviewing and up dating its manuals and instructions. Enforcement of the guidelines must be a priority.

Conclusion

8.121 The report has clearly identified serious shortcomings in administrative inquiries that include:

- lapses in adherence to the principles of procedural fairness—particularly the right to know the allegation and the evidence supporting the allegation—even to the extent that investigations were carried out without the knowledge of the person subject to the inquiry;
- breaches of confidentiality;
- conflicts of interest that call into question the independence and fairness of the investigation process and rob the system of its integrity;
- poorly conducted investigations that lack thoroughness due to factors such as inept gathering of evidence, inadequately trained and or unprofessional investigators, and flawed analysis;
- delays; and
- failure in some cases to protect, or prevent reprisals against, those pursuing a complaint or giving evidence before an administrative inquiry.

8.122 The committee is concerned that there appears to be no mechanism in place to ensure that the requirements set down in Defence regulations and instructions are rigorously enforced. Furthermore, evidence suggests that the ADF has had little success in removing the perception that administrative inquiries lack impartiality and independence. The committee believes that its proposed Australian Defence Force Administrative Review Board will provide the necessary oversight to ensure that any failure by investigating officers to observe the guidelines set out in the various ADF manuals will be brought to light and corrected. It would also provide the necessary

117 Confidential *Submission C1*.

appeal or review process to improve investigating officer inquiries which would now be restricted to non-notifiable incidents. It would turn the spot light on the shortcomings in such investigations and not only correct individual investigating officer failings but more broadly act as an incentive for investigating officers to apply themselves more assiduously to their responsibilities. More importantly, however, this statutorily independent review board would for the first time effectively combat the perception that administrative investigations lack impartiality. A full discussion of the details of this proposed board are presented in chapter 11.

8.123 This chapter was primarily concerned with presenting a general understanding of the strengths and weaknesses of investigations under the current ADF's administrative system. There is a particular subset of inquiries that come under this general category of routine and investigating officer inquiries that have distinct features. They deal with serious accidents and sudden deaths and are considered in the following chapter.

Chapter 9

Administrative inquiries into sudden death

9.1 The procedures for inquiries into serious accidents or sudden deaths in the ADF are no different from inquiries undertaken by an investigating officer considered in the previous chapter. The complexities often involved in such cases and the close involvement of family members and friends, however, present specific challenges for the investigator. This chapter looks at investigations undertaken by investigating officers into accidents and sudden deaths to assess their effectiveness, fairness and whether they meet the needs and respect the rights of all those involved in such investigations.

Communication and provision of information—next of kin

9.2 The report has identified as a major flaw the failure by investigators to keep complainants and those subject to a complaint or allegation adequately informed about the proceedings. The relatives of ADF members who had died suddenly also raised concerns about the difficulties they had in gaining access to information about the matters surrounding the death. Mrs Campbell, whose daughter was under the impression she was to be discharged from the Air Cadets and subsequently took her own life, had to go through the FOI process to obtain material to help her understand the circumstances of her daughter's discharge. She stated:

> I was never at any time given any access to information at a local level without my having to drag it out of them.[1]

9.3 Mrs Palmer, the mother of a soldier who had committed suicide, stated she was naïve in waiting for the report on her son's death. She told the committee she did not realise that she 'had to go chasing it'. She added:

> I went and found things myself. There was nothing forthcoming. I had to write to ministers and do a ministerial and all that sort of thing to get anywhere…I only got one page of an autopsy which just said 'healthy male'. I never got a full report. [2]

9.4 Another parent of a son who had committed suicide confided that, 'If they were not so secretive and silent then maybe we could stop wondering. As it is now we cannot move on with our lives'.[3] This family had many more questions that they believed could be answered by officers and supervisors. Another father, attempting to clear his son's name, maintained that:

---

1 *Committee Hansard*, 21 April 2004, pp. 4–6.

2 *Committee Hansard*, 1 March 2004, p. 84.

3 Confidential *Submission C12*, p. 3. Confidential *Submission C16* makes a similar point.

> Never did RAAF contact me with information. All that is now known was initiated by me and on every occasion. RAAF has been evasive and supplied information only under FOI, and many applications were totally refused.[4]

9.5 Furthermore, some family members of suicide victims felt that they were not sufficiently involved in the investigation. Mr Satatas suggested that it should be 'automatic for the Army to have asked our family whether we wanted an Inquiry into John's death'. He also wanted to be fully informed about all aspects of the inquiry including the reasons for the inquiry and its progress. He asserted that, 'The Army did not tell us that an Inquiry would be held and they did not tell us the reason for making the decision to hold an Inquiry.'[5] He argued further:

> For the Inquiry to have any meaning it would have had to be full and comprehensive and certainly should have included consultation with and consideration of matters raised by family members and the circumstances of John's death. We believe that the Army ignored some of our suggestions in regards as to who should be interviewed. We have not been asked our views about what the Inquiry was to include. [6]

9.6 A social worker with the Department of Defence told the committee in camera that 'there is too big a gap between what an organisation thinks it has offered and what the families actually experience'. She said, 'the big problem with resolving traumatic death of any sort is that people need information, and they need that information to be given to them in a timely way and in a credible way…'[7]

9.7 In part, the problem may stem from unrealistic expectations of the purpose of an administrative inquiry. Colonel John Harvey, Special Adviser to the Director General The Defence Legal Service, recommended that the ADF change its policy to ensure that the primary purpose of any inquiry in Australia under the Defence (Inquiry) Regulations is to establish what action needs to be taken to avoid a recurrence of an incident.[8]

9.8 That said, the committee believes that the system at present is not meeting the needs of the close relatives of members who have been seriously injured or have died suddenly while serving in the ADF. It needs to be better attuned to the situation of family members and accept that the interests of the forces do not necessarily coincide with those of family and friends of injured or deceased members. It should take account of their needs.

---

4 In camera *Committee Hansard*, 10 June 2004, p. 2.

5 *Submission P9A*, p. 3.

6 *Submission P9A*, p. 2.

7 In camera *Committee Hansard*, 9 June 2004, pp. 4, 7.

8 *Submission P64*, p. 5.

9.9 The provision of information, however, is only one aspect of ensuring that people are kept well-informed about an inquiry. Some people may need assistance to comprehend the material made available to them. Mr Satatas told the committee.

> The Army did not offer us any assistance, such as a lawyer, counsellor or translation help after John's death, or relating to the inquiry. Most public services would provide these as a matter of course and in any event should have been available in relation to any inquiry into the death of our son John given the circumstances of his death.
>
> We have been given no information in regards to the finalising of the inquiry.[9]

9.10 The Burchett Report, which identified problems similar to those discussed here, made a number of recommendations. It suggested that the complainant ought to have the benefit of an explanation by a trained expert so as to minimise distress which may be caused by the decision.[10] The committee endorses this recommendation.

9.11 Lieutenant General Leahy told the committee about procedures now followed for the sudden death of a member:

> For many years, Army has had suitable protocols for dealing with the death of its members on operations. However, there was no such single set of protocols dealing with the death of Army personnel who were not on operations. Accordingly, on 19 November last year, I authorised a set of protocols to be followed where members of the Army had either tragically taken their own lives or been killed accidentally while on duty in Australia. There are a number of key tenets: prompt reporting, recording of all decisions, ensuring that relevant agencies are notified, close monitoring of all actions, working directly with bereaved families throughout the process and the continued involvement of the chain of command.[11]

9.12 The committee understands the frustration and sense of alienation that some people may experience when, in their view, they are kept in the dark about the process of an inquiry or are not provided with assistance to help them make sense of the information that is provided. Without doubt, the evidence shows that many people are disappointed and disturbed by this failure to be kept adequately informed and consulted about the proceedings of an administrative inquiry.

9.13 The committee notes that the Defence Inquiries Manual gives particular attention to the ADF's responsibility to the next of kin of members who 'are killed or injured in duty-related accidents particularly in peacetime'. It states:

---

9 *Submission P9A*, p. 2.

10 Report into Military Justice in the Australian Defence Force, conducted by Mr J.C.S.Burchett, QC, An Investigating Officer appointed by the Chief of the Defence Force, under the Defence (Inquiry) Regulations 1985, p. 105.

11 *Committee Hansard*, 1 March 2004, pp. 32–3.

> The families of deceased members should be treated with sensitivity and understanding. Where practicable and consistent with security considerations, provision is to be made for the next of kin to attend Boards of Inquiry whether the Boards are open or closed; and a liaison officer is to be appointed to assist them during the period of the inquiry. Next of kin are to be offered counselling services, that are relevant to the accident or incident and to the inquiry itself, if required, at Commonwealth expense.
>
> Consistent with security and privacy considerations, next of kin should be advised of the outcomes of Boards of Inquiry and informed of steps taken to implement recommendations. In addition, they are to be warned prior to the release of information to the media regarding the inquiry.[12]

9.14 This advice is given in the context of Boards of Inquiry. The committee suggests that similar advice be included in the section that deals with Investigating Officers Inquiries and would also apply to sudden deaths by suicide of ADF members.

Conflict of interest—the individual and the institution

9.15 The previous chapter identified conflicts of interest inherent in the chain of command structure where command influence is seen to taint the objectivity of an administrative inquiry. This criticism applies equally to investigations into sudden deaths where witnesses saw a need to have an independent investigator.

9.16 The members of Jeremy Williams' family shared this observation with regard to investigations into suicide. They argued strongly for the need to have an independent person outside the ADF participate in inquiries.[13] They submitted:

> If it is common practice within the ADF and it certainly seems to be from our experiences of late and our time in the military, that investigations of a controversial nature, where loss of life has occurred, are conducted by high ranking and/or senior officers. This means that often lower ranked members must give their evidence in an environment that is uncomfortable and does not necessarily encourage the submission of evidence without fear or favour. This is particularly true if the perception is held that the evidence being given is of an adverse nature and could reflect badly on the peers or seniors. The need for impartiality for any such investigation is immediately put into question where senior officers are in most cases investigating similarly ranked officers. The integrity and willingness of an investigating officer to find adversely without fear or favour against his or her peers, superiors and even subordinates is open to suspicion and questions.[14]

9.17 Apart from undue influences arising out of the chain of command structure, the Defence Force as an institution may confront a clash of interests on a broader and

---

12 Australian Defence Force, Administrative Series, *Administrative Inquiries Manual,* Australian Defence Force Publication 2002 (ADFP 202), paras 1.45–1.46.

13 *Submission P17*, p. 4.

14 *Submission P17*, p. 9.

more subtle front. The very nature and make-up of the ADF and the way of life of its members makes it difficult for members committed to the forces to admit to failings within their own ranks. Understandably, those who hold strong ties of loyalty to an institution would be reluctant to lay bare its flaws.

9.18 Under such circumstances, the rights of an individual to a fair and proper process may be compromised by the desire of those in the ADF to protect the institution. One example, recognised by Lieutenant General Leahy as a problem, occurred with the investigation into allegations about the mistreatment of the bodies of two individuals in East Timor. In this highly publicised case, discussed above in chapter 3, it seems that the Army wanted to appear to be acting decisively but at an unnecessary cost to the alleged offender. Lieutenant General Leahy acknowledged that there were problems with proceeding with administrative action after failing to obtain a conviction.[15] He told the committee:

> The administrative action taken against the solider, on reflection, might have been best not taken. I have directed action to rectify defects which this case revealed in Army procedures and practices. I am also pleased to report to the committee that the soldier is assisting the Army to take remedial action to ensure that a situation like this does not happen again. The recent establishment of a Director of Military Prosecutions is a further positive development.[16]

9.19 In many cases cited by witnesses, however, it would seem that the ADF sought to minimise any harm to its image by withholding information or by deflecting attention away from critical evidence. Generally, this perception arose in cases that were likely to draw significant public attention.

9.20 The mother of a son killed in an accident was highly critical of the 'in-house' nature of investigations with their narrow and biased focus. She described her experiences of the investigation:

> Often it seemed to us that too much time was spent trying to find ways to blame the accident on the crew and too little on the systemic problems that led to it, thus affording protection to those within squadron hierarchy and abandonment to those killed. We had no wish to see any one person held responsible, but felt strongly that, unless roles and procedures were closely scrutinised and improved where necessary, similar circumstances would recur in the future and more lives would be lost.
>
> Without transparency and the involvement of external parties, questions and suspicions will always remain close to the surface. Within a closed environment, too easily incompetence and errors can be hidden and faulty systems covered, making any hope of a clear overview unlikely, change unnecessary and military justice impossible.[17]

---

15 *Committee Hansard*, 1 March 2004, pp. 29–30.

16 *Committee Hansard,* 1 March 2004, pp. 29–30. See also *Submission P61*, p. 4.

17 Janice McNess, *Committee Hansard*, 28 April 2004, pp. 62–4.

9.21 She was not alone in expressing her doubts about the impartiality of investigations. Mrs Palmer, whose son committed suicide in late November 1999, believes that the ADF is not genuine in its endeavours to stamp out discrimination and bullying. She asserted that, if the ADF were serious, it 'should have no problem with every case of mistreatment, discrimination and death being thoroughly investigated by an independent body to be made accountable to the public, as would any other employer'. In her words:

> The Defence Force is no longer capable of investigating in-house and can no longer hide from its obligations to its members, members' families and the Australian public.[18]

9.22 The committee believes that the establishment of an independent statutory investigatory body as recommended in Chapter 11, which would now take responsibility for an investigation involving a sudden death or serious incident, will go a long way to address this problem of lack of independence in the investigation. (see recommendation 29, para. 11.67)

Competence of inquiries into sudden or accidental deaths and the need for experts

9.23 The criticism directed at the poor standard of administrative investigations discussed in the previous chapter applies with equal force to the inquiries into sudden death. A number of witnesses asked for improvement in the conduct of investigations into sudden or accidental deaths. They felt that the respective investigations were incomplete: that evidence was overlooked and important questions not asked.[19] These types of inquiries, however, often have additional layers of complexity that place extra demands on the inquiry process.

9.24 The immediate stage involving activities such as securing and examining the scene of the incident was one area of concern in the investigation of a sudden death. A number of relatives of members who had committed suicide were critical of the initial examination, with many believing that it was flawed. This type of examination, reliant on specialist investigative skills, is rightly the province of the civil police in the first instance to determine whether any criminal act is involved.

9.25 The actual investigation undertaken by an investigating officer also attracted criticism. Mrs Palmer told the committee that she would have liked the investigation to be more thorough than it was 'just in case there was anything'.[20]

---

18 *Committee Hansard*, 1 March 2004, pp. 72–3.

19 For example see Mrs Palmer, *Committee Hansard*, 1 March 2004, p. 75, who felt that there was 'not much of a military investigation with evidence discarded'. Mrs McNess, *Committee Hansard*, 28 April 2004, pp. 62–4.

20 Mrs Palmer, *Committee Hansard*, 1 March 2004, p. 91.

9.26 The Williams family took the same approach. Even though a Brigadier carried out the investigation into Jeremy's death, the family noted that, to their knowledge, this man 'had no training in investigative procedures, interface with the judiciary or making valid and soundly based investigative judgements' other than his officer training. In their view, the people who conduct investigations in the military are 'not trained to a high enough standard, they have no interface with the judiciary, their methods are unsafe and their conclusions are unsafe and unsound'.[21] They go on to state:

> Given the complexity of the factors involved in an investigation, and the importance of having a person qualified to weigh and balance evidence, and reach sound conclusions, it is necessary that this person have the necessary qualifications to carry it through. We are very concerned about the high risk of unsound conclusions being reached, if Investigating Officers with no legal qualification or without training in how to conduct complex, quasi-judicial investigations can be appointed. This can only be achieved with an independent body suitably trained and qualified.[22]

9.27 Questions were also raised about the need for expertise in those conducting an inquiry into a sudden death. Mr Peter Gerrey, who was employed by Comcare from 1995 to 2000 as an Occupational Health and Safety Officer and a workplace investigator and had conducted workplace inspections in military establishments, argued that:

> Conducting an inquiry requires specialist skills and in the case of injury or fatalities a 'Risk Assessment' should be conducted. Additionally, this risk assessment is required by the *OHS (CE) Act 1991 and Regulations*. My experience is that investigations at military establishments following ADF enquiries have generally failed to find 'Risk Assessments' of procedures possibly contributing to accidents or injuries.[23]

9.28 A number of witnesses, including Mr Gerrey, called for independent experts to be involved in investigations of sudden deaths and accidents. Mr Gerrey asserted:

> ADF Inquiries into workplace accidents resulting in fatalities, suicides or serious personal injury should not be conducted by ADF officers to the exclusion of other agencies or authorities such as Comcare.[24]

---

21 *Committee Hansard*, 28 April 2004, p. 58.

22 *Submission P17*, p. 8.

23 *Submission P7*, p. 5. In full, he told the committee that between 1991 and 2000 he: 'conducted workplace inspections in military establishments for both the Navy and Comcare. When required, by Comcare, I conducted or reviewed ADF Inquiries into workplace accidents in New South Wales that had resulted in fatalities or serious personal injuries. The ADF and Comcare had an agreement whereby the ADF would conduct their internal inquiries and/or investigations following a serious injury or a fatality at an ADF workplace. A Comcare investigator would then review these inquiries and/or investigations'. *Submission 7,* p. 3.

24 *Submission P7*, p. 2.

The role of the coroner

9.29 The degree of complexity involved in an investigation into a sudden death will test the training and experience of an investigating officer. His or her ability will be particularly stretched when dealing with matters such as suicide or accident where expert knowledge may be needed. This raises the question of the role of the coroner in the investigation of sudden deaths. The Inquiry Manual advises:

> In serious incidents involving loss of life there is a need to involve civilian police and the relevant State or Territory coroner from the outset. To facilitate the involvement of the coroner, an ADF liaison officer is to be appointed to assist the coroner. Consideration will need to be given to the impact of the incident on relatives and friends, including ADF members, before an inquiry is actually commenced. However, this does not prevent the announcement of an inquiry promptly after an incident occurs.[25]

9.30 A number of witnesses felt that the State coroner should be automatically involved. Mrs McNess, whose son died in an aircraft accident, was distressed by the decision of the coroner not to conduct an inquest despite the request by both families that one be held. She explained:

> His explanation that any accident that had cost the Air Force so dearly in loss of life and equipment would have attracted a comprehensive investigation and thus negated his need for further examination was unconvincing, especially in light of the Defence Force's well documented history of in-house and closed investigations.[26]

9.31 Speaking more generally, Mr Neil James, Australia Defence Association, suggested:

> We believe that if state coroners were involved as a matter of course then we perhaps would not have some of the angst that has been exhibited by some of the families about some of the circumstances. Also, to an extent, some of the full range of things that contributed to some of the suicides might come out.[27]

9.32 Colonel John Harvey explained that:

> Where an incident in Australia results in death, an inquiry by the ADF does not replace or in any way usurp the role or responsibility of the State or Territory Coroner to conduct an investigation or coronial inquest. The fact that a coroner will often accept the proceedings of a board of inquiry and

---

25 Australian Defence Force Publication, Administrative Series, *Administrative Inquiries Manual,* para. 1.15.

26 *Committee Hansard,* 28 April 2004, pp. 62–4.

27 Mr Neil James, *Committee Hansard*, 9 June 2004, p. 31.

> decide not to conduct a further inquest is an indication of the quality of some boards of inquiry.[28]

9.33 He recommended that the ADF change policy to ensure the wide promulgation of the fact that State and Territory Coroners retain the primary responsibility to investigate deaths in Australia.[29] The committee agrees with this recommendation.

9.34 Lieutenant General Leahy explained that some years ago the Army, at times, would be happy for the coroner to report on a suicide and that Army would not investigate it.[30] He indicated that that was not good enough and Army now wanted to go beyond the coroner's process and have a suicide investigated 'through a board of inquiry with terms of reference'.[31] He added:

> What we want to do now is try to determine the reasons behind the suicide. We want to try to figure out whether there are other things that we could be doing, whether there is something in the environment or something that we are doing wrong.[32]

Committee view

9.35 The committee notes this development but is of the view that the ADF does not possess the skills, expertise or degree of independence necessary to inquire effectively and properly into deaths and serious accidents within the Services. It has recommended the establishment of an independent body that will have the responsibility for inquiring into sudden deaths and serious accidents. If, after the initial investigation by the civilian authorities and, if no criminal act is suspected, the ADFARB would take responsibility for the investigation. This means that all notifiable incidents including suicide, accidental death or serious injury would be referred to the proposed Australian Defence Force Administrative Review Board for investigation. The CDF would have the authority to appoint a service member or members to assist any ADFARB investigator or AAT inquiry. (see recommendation 29. para 11. 67). In conferring this responsibility on the ADFARB, the committee in no way suggests that State and Territory coroners would not retain the primary responsibility to investigate deaths in the ADF.

---

28 *Submission P64*.

29 *Submission P64*, p. 5.

30 *Committee Hansard*, 5 August 2004, p. 18.

31 *Committee Hansard*, 5 August 2004, pp. 18 and 74.

32 *Committee Hansard*, 5 August 2004, p. 18.

Procedures following investigation

9.36 A number of witnesses noted the failure by the ADF to act in accordance with the recommendations contained in an administrative report.[33] Mr Amos asserted that the SOI had failed to implement the recommendations contained in the report concerning the ill treatment of his son, and that Training Command did not follow-up to ensure compliance with those recommendations. He was of the view that, had those in command at SOI acted as required and implemented the recommendations contained in his son's report, there was a good possibility that Jeremy Williams' suicide could have been prevented.[34] He concluded:

> The allegations made about injured soldier treatment and allegations of verbal abuse arising from this tragedy were almost identical to those we had raised in our ministerial about 2 years earlier and had been assured no longer existed.[35]

9.37 Lieutenant General Leahy acknowledged the mistakes made in failing to ensure that the recommendations from the previous incident had not been fully implemented. He told the committee:

> …our investigation revealed that there had been a failure to act on recommendations from a similar incident—not involving a suicide—at the School of Infantry some years before…It became patently apparent that the Army needed to take action to tighten up and formalise mechanisms for tracking and ensuring that recommendations are acted on and followed[36]

9.38 The committee accepts that the death of Jeremy Williams exposed an urgent need for ADF to have in place an effective means to monitor the outcomes of investigations and any required corrective action. This observation leads to the following discussion on the important role that inquiries have in ensuring that inappropriate behaviour and improper conduct are not only identified but that appropriate action is taken to remedy them.

---

33 Confidential *Submission C1*, Attachment—Chronological Order of events, pp. 10 and 13 and Confidential *Submission C61*.

34 *Submission P6*, p. 2. He stated: 'Senior staff at SOI assured us that they had fixed the problem they even went as far as to invite me down to inspect the changes they had made…this was backed up by the investigation report covering letter that claimed that the reports recommendations had been implemented. We accepted their word in the firm belief that Orders and Instructions contained in reports are to be acted upon… however it has since been admitted by the army that the recommendations had not [been] implemented.'

35 *Submission P6*, p. 2.

36 *Committee Hansard*, 1 March 2004, p. 34. See letter to Mr and Mrs Williams reproduced in *Committee Hansard*, 28 April 2004, pp. 56–7.

Committee view

9.39 The committee found that inquiries into accidents and sudden deaths by the ADF at the Investigating Officer level are subject to the same shortcomings as other administrative inquiries. Conflicts of interest, poorly conducted investigations and delays undermine the effectiveness and fairness of such proceedings. Moreover, in some cases inquiries into sudden death, which often deal with complex matters, magnify these deficiencies. The involvement of family members still grieving over the loss of a loved one also place heavy demands and responsibilities on the investigating officer. The committee is of the view that the ADF must give particular attention to the need to keep next of kin well informed about the progress of an inquiry and the need to have expert advice available to the investigating officer. It is also important for the ADF to ensure that the interests of the Defence Forces do not take precedence over the rights of close relatives and friends.

Inquiries as early detection mechanisms

9.40 As noted in the previous chapter, complaints from individuals can point to a problem that may be occurring more widely. They can be valuable indicators of broad trends within the ADF concerning matters such as inappropriate behaviour or lapses in safety standards. It is important that each inquiry contributes to an understanding of the overall conduct of personnel in the Forces that may alert the ADF to any potential problems. The incidents related in this chapter underline the importance of recording and monitoring the findings of inquiries.

9.41 Lieutenant General Leahy acknowledged that Army does make mistakes. He accepted that it had failed to detect trends and patterns and had not learnt enough as an institution from the errors identified. He explained:

> This has been largely due to lack of visibility and senior level management oversight. We are now establishing an Army wide database of administrative inquiries. This database will not only allow the progress of inquiries to be tracked but, more importantly, record the decisions of appointing authorities and allow the implementations of decisions to be closely monitored. We will also work with the Registrar of Military Justice to contribute to ADF wide visibility of discipline investigations and administrative inquiries.[37]

9.42 Mr Earley, IGADF, also argued that greater attention needs to be given to making the results of inquiries more widely known if the ADF is to benefit from their findings. He recognised that steps needed to be taken to break down the compartmentalisation within commands, so that the outcome of a particular inquiry builds on an overall appreciation of the findings and recommendations of administrative inquiries across the ADF. He elaborated on the initiative to improve the visibility of the results of administrative inquiries:

---

37 *Committee Hansard*, 1 March 2004, pp. 28–9.

> Under development at the moment—and I think this is a very good initiative—is a reporting system whereby all administrative inquiries above the level of investigating officer are to be centrally reported to my office. I volunteered to be the manager of that. For the first time that will enable a wider oversight, a wider visibility, of exactly what types of inquiries are going on out there. In particular, the implementation of recommendations and outcomes from those inquiries could undergo some scrutiny and some monitoring, which currently is a bit of a difficult area and, as I think most people would agree, needs some attention. I think that is a very positive step. I might also say that that general approach is available currently with the discipline system—the conduct of trials. A system that has been developed quite recently by the Registrar of Military Justice will allow that sort of information to be available.[38]

9.43 The committee welcomes the steps being taken to establish one central register that records the results of administrative inquiries. This database should be sufficiently comprehensive to provide information on the nature of matters being investigated, the timeliness of investigations, the recommendations coming out of them, the appointing authorities' responses to the recommendations and the monitoring of the implementation of recommendations. The committee would be interested in receiving feedback about this register and its operation as soon as it is sufficiently developed. It has recommended that the proposed Australian Defence Force Administrative Review Board take responsibility for the monitoring of administrative inquiries and that it include such information in its annual report (see recommendation 29, para. 11.67).

Conclusion

9.44 This and the previous chapter have focused on the routine and the investigating officer inquiry. Given that the Government has undertaken to implement the recommendations of the Burchett Report, and has responded to the JSCFADT's reports, the committee sees little point in reciting their findings and many recommendations to improve administrative inquiries. It has in some instances endorsed certain recommendations and made additional ones. At this stage, however, the committee is not convinced that the measures taken in response to previous inquiries have been or will be adequate and, in particular, will result in a robust and effective administrative system.

9.45 The committee must rely heavily on monitoring the progress of these initiatives to be satisfied that the reforms are producing the desired results. Thus, it is crucial that the committee has before it information that will enable it to scrutinise effectively the implementation of reforms. To address this matter, the committee has recommended that the ADF submit an annual report to the Parliament outlining inter alia the implementation and effectiveness of reforms to the military justice system,

---

38 *Committee Hansard*, 5 August 2004, p. 99.

either in light of the recommendations of this report or by other initiatives. (see recommendation para 13.29).

9.46 One of the most important components in any justice system is the right to have a review or the right to appeal a decision. The following chapter examines the avenues open to a member who is seeking to appeal a decision to take adverse action or who wants the findings of an inquiry reviewed.

Chapter 10

Adverse action, appeal processes and external review of administrative procedures

Appeal and review processes

10.1 If, during the course of an inquiry, circumstances come to light that reflect adversely on the professional conduct of a member, the appointing authority may decide to take adverse administrative action against that person. Adverse administrative action is official action that reflects formal disapproval on a temporary or permanent basis. Conduct or performance which results in DFDA or civilian court proceedings may also be relied on to support adverse action.

10.2 Clearly, the punishment for a member facing administrative action, particularly if it involves a serious warning, removal from duty or discharge from the force, has serious implications for his or her career and professional standing. It is important that such a member is afforded certain rights in order to ensure that his or her interests are properly protected.

10.3 The appeal and review processes underpin accountability and are an essential guarantee against injustice. They provide an important mechanism whereby the findings of one decision-maker are tested by another. In this way, the process is held up to scrutiny and can be assessed to ensure that the proceedings were proper and the decision correct. It should provide members of the ADF with assurances that the process is fair and objective and engender public confidence in the integrity of the system.

10.4 Australia's military justice system recognises the right of an individual to complain about a decision. It provides a number of avenues for a member to lodge an appeal or seek a review of a decision. For instance, where adverse administrative action is proposed, there are safeguards in place to ensure that people in the ADF receive procedural fairness through the notice to show cause process. Also, under the redress of grievance provisions, a member has a legally protected right to make a complaint about any matter affecting his or her service.[1] General Cosgrove stated that the acid test of the military justice system is 'whether there are adequate and independent avenues of review and appeal available'.[2]

10.5 This chapter looks at the adequacy of the internal review and appeal processes available to ADF members including:

- notice to show cause; and

---

1 See for example, General Cosgrove, *Committee Hansard*, 1 March 2004, p. 9.

2 *Committee Hansard*, 6 August 2004, pp. 40–3.

- redress of grievance and the CRA as an oversight body.

10.6 In Australia the right to 'due process' or procedural fairness is not constitutionally guaranteed. However, at the federal level, the Administrative Decisions (Judicial Review) Act 1977 (Cth) (ADJR Act), in particular, requires that administrators observe the principle of natural justice. The Act provides for a right of review, which is one aspect of procedural fairness.

10.7 As discussed in the previous chapter, there are two rules that underpin the principles of natural justice:

- The hearing rule that no person should be condemned unheard is a well-founded principle of Australian administrative law. It requires that individuals adversely affected by a decision must be fully informed of the action against them and allowed a reasonable opportunity to put their case. The facts, information or other evidence relied on by the decision-maker must be disclosed to the person facing adverse action.
- The no bias rule requires the decision-maker to be neutral. He or she must act impartially, honestly and without prejudice, and be above suspicion that he or she has an interest in the outcome of the matter or has prejudged it.

10.8 There is also growing recognition that certain rules of evidence in administrative decision making must be observed. Notably, that a decision must be based upon evidence that logically proves the case.

Notice to show cause

10.9 The ADF recognises that for members to be able to defend their position adequately, they must be fully informed about the reasons underpinning the decision to take adverse administrative action. They must also be provided with all the evidence supporting the decision, and be allowed the opportunity to reply to the findings. This is commonly provided for in the notice to show cause processes used in the ADF.[3] Thus, an individual whose conduct has been found to be of an unacceptable standard and is facing adverse administrative action would be issued formally with such a notice. It allows him or her the opportunity to test the evidence supporting the notice, challenge the decision-maker's findings and refute the argument for the adverse administrative action.

10.10 Irrespective of rank or position, or whether a member is giving or receiving orders, the principles of natural justice should apply to protect members from an arbitrary and unfair decision. The Defence submission explained:

> …if the appointing authority accepts the facts and recommendations, but before a decision on the matter is made, any proposed adverse

3 *Committee Hansard*, 1 March 2004, p. 7.

> administrative action against a member must be preceded by a notice to show cause process. This affords the member natural justice before a final decision is made on the issue and means that the member will have the right to respond to a proposed adverse decision, and the alleged facts being relied upon. This is also the opportunity to seek a review of any decisions made.[4]

10.11 The Defence Manual ADFP 06.1.3 sets down the steps to be followed when a notice to show cause or similar form of notification is issued. They are consistent with, and are intended to promote, the principles of procedural fairness. The notice must be in writing and contain:

- the proposed adverse decision;
- a statement of the facts, information, or other evidence to be relied on in making the decision;
- relevant documents; and
- an invitation to the member to respond within a specified time (the law does not fix a specific time but requires that the member be given a 'reasonable opportunity to do so').[5]

10.12 There can be no doubt about the requirement to provide all relevant material to the member. The Manual elaborates on this matter:

> A member is entitled to know the substance of the case against them and sufficient facts giving rise to the action, so that the member has a reasonable opportunity to respond to the proposed action. The notice should precisely and clearly summarise the matters alleged or other information about the misconduct or poor performance of the member.[6]

10.13 It stresses that there is 'a general legal obligation on the part of decision-makers to take positive steps to ensure that all relevant information is disclosed to the member'.[7] The Manual goes further:

> A copy of all relevant medical reports, witness statements or police reports, DFDA or civilian conviction certificates, inquiry officer reports or training reports should be attached to the notice so they may be considered by the member. [8]

10.14 An article in the Defence Forces newspaper reinforced this point:

> If the proposed action affects the member's rights, interests or expectations such as their pay entitlements or reputation, no matter what rank or position

---

4 Submission *P16*, para. 2.67.

5 ADFP 06.1.3, paras 2.6 and 2.24.

6 ADFP 06.1.3, para. 2.13.

7 ADFP 06.1.3, para. 2.16.

8 ADFP 06.1.3, para. 2.20.

> they hold, the member must be given an opportunity as to why the proposed action should not be taken. This is a requirement of procedural fairness, also known as 'natural justice'.
>
> Once the member has had the opportunity to respond, the commander must decide what form of adverse administrative action should be imposed, if any. This professional decision must be fair, open, lawful and be based on the rights of the member and the merits of the case without bias.[9]

10.15 The Defence (Personnel) Regulations set down the requirements where an officer's service may be terminated. The regulations also observe the principles of natural justice.[10]

10.16 Once the member has responded to the notice to show cause, the original decision must be reviewed and a judgement made about whether or not to proceed with the adverse administrative action.[11]

Redress of Grievance (ROG)

10.17 The administrative system also provides for an ADF member to make a complaint about administrative procedures or decisions through the redress of grievance process. It is a formal procedure available only to a member of the ADF, allowing complaints to be investigated and reviewed and for wrongs to be corrected where necessary. It is accepted as a legitimate and important means of ensuring that decisions affecting members' rights, working conditions and careers are made fairly, impartially and according to law.[12]

10.18 The redress of grievance should be considered to be a last resort.[13] As noted in previous chapters, the ADF prefers that, in the first instance, complaints should be resolved at the lowest level possible through normal command channels and administrative arrangements. Thus, if there were a complaint about the actions of another person, the chain of command would normally deal with it. Indeed, at the initial stage of lodging a complaint, the complainant must submit their complaint to the commanding officer.

---

9 'Decisions, decisions', *Army, the Soldiers' Newspaper*, 8 April 2004.

10 Defence (Personnel) Regulations 2002, Sub regulation 85(2). It reads: The officer is to be given a termination notice that: states the proposal to terminate the officer's services; states the reason for the termination; sets out particulars of the facts and circumstances relating to the reason for terminating the service that 'is sufficient to allow the officer to prepare a statement of reasons why the service should not be terminated; invites the officer to provide a written statement of reasons why the service should not be terminated; and specifies a period of at least 28 days after the date of the notice as the period in which the officer may give the statement of reasons.

11 Legal advice, See Ms Harris, *Committee Hansard*, 2 August 2004, p. 40.

12 Department of Defence, *Submission P16*, p. 30 and CRA, *Committee Hansard*, 2 August 2004, p. 24.

13 *Committee Hansard*, 2 August 2004, p. 34.

10.19 Where the complaint cannot be resolved within the chain of command, members may initiate a complaint by lodging a Redress of Grievance (ROG) or complaint to the Inspector-General of the Australian Defence Force (IGADF). The role of the IGADF is discussed in the following chapter.

10.20 The CO is required to acknowledge receipt of an ROG in writing, investigate the complaint, decide whether the member has grounds for complaint and resolve the matter if it is within his or her authority. He or she is to inform the complainant in writing of the results. On receiving an ROG, the unit is required to advise the Complaint Resolution Agency (CRA) so that it is aware of who submitted the ROG, the subject matter and the date the grievance was lodged.[14]

10.21 The CRA is responsible for the present ADF's ROG system.[15] It was established in 1997 as part of the Defence Personnel executive to ensure 'independence in the investigation, review and handling of complaints made by members under the redress of grievance procedures'.

10.22 Under Defence Force Regulations, if a member is not satisfied with the decision of a commanding officer on a complaint, the member may refer the complaint to the Chief of the relevant Service or in some cases to the Vice Chief of the Defence Force. An officer not satisfied with the result may refer the matter to the CDF.[16]

The effectiveness and fairness of the notice to show cause and the ROG processes

10.23 The report has presented a solid body of evidence that supports the contention that there are deficiencies in investigating officer inquiries and Boards of Inquiry (see chapters 8, 9 and 12). The committee now turns to establish whether these or other problems find their way into the appeal or review processes. Indeed, it seeks to put the ADF's administrative system to General Cosgrove's acid test of whether there are adequate and independent avenues of review and appeal available to members (see para. 10.4).

Procedural fairness—access to all relevant material and the consideration of all the evidence

10.24 There can be no doubt about the requirement to provide a person facing proposed adverse action with all the material that was taken into account when deciding that such action was appropriate. The ADF highlights this important requirement in its instruction manuals and in internal publications (see paras. 10.12–16). Yet a number of witnesses assert strongly that they were not provided with all

---

14 *Committee Hansard*, 2 August 2004, p. 24.

15 Department of Defence, *Submission P16*, p. 45.

16 Regulations 76 and 79, Defence Force Regulations 1952.

relevant documentation. One witness stated categorically that 'no evidence, statements or other documents containing evidence were attached or disclosed…in the Notice to Show Cause Why a Censure Should Not Be Imposed.'[17] A pilot presented with an unsuitability report argued that his career as a pilot ended without the opportunity to sight the case against him. He submitted:

> I was not given access to the evidence used to support the decision or given a chance to respond before the decision was made. I was not told of this decision until…over two weeks after the decision was made.[18]

10.25 As a further complication, he argued that crucial documents indicating serious flaws in the process leading to the unsuitability report were not considered. In his mind, the failure to 'disclose favourable evidence constituted a significant and clear breach of procedural fairness'.[19]

10.26 In an almost identical situation, another officer found that, on the purported grounds of unsuitability, he received 'no warning or opportunity to understand, rebut or correct the deficiencies' that were alleged in his performance before his removal was effected.[20]

10.27 Indeed, a number of witnesses had to battle to gain access to material vital to building their defence. One member submitted that an important document:

> …was only disclosed after I took legal action. If I had not done so I would never have received the document or even been certain of its existence. I have had to spend over $10 000 dollars to ensure full disclosure.[21]

10.28 Not only did some members experience difficulty in obtaining relevant material, but some also suggested that they did not get a fair hearing. One witness explained that he had not once been interviewed or questioned throughout the five years and seven months of processing his grievance.[22] He believed that there was a strong predisposition of the relevant officers not to investigate the complaints. He summed up his experiences:

> The unresponsive, superficial, tardy and inefficient treatment of myself and my formal complaints in the redress system was not expected given the high standard of administration demanded in other areas of Defence. The poor treatment I received was sustained over a period of more than five years.[23]

---

17 Confidential *Submission C15*, p. [6].

18 Confidential *Submission C9*.

19 Confidential *Submission C9A*, p. 3.

20 Confidential *Submission C38*.

21 Confidential *Submission C9*, p. 13.

22 Confidential *Submission C14*, para. 7.3.

23 Confidential *Submission C14*, paras 4.1 and 7.2.

10.29 Another member, who was not consulted during the investigation process, found that his review had relied on evidence used to support the original administrative action such as past psychological tests. He argued:

> I was denied natural justice in that I was not informed of the content of the report, I was not provided with the evidence used to support the case, and I was not given the opportunity to prepare and present a case in my own defence.[24]

10.30 An independent review of one case found that the member was given no effective opportunity, as required by the relevant Defence Instruction, to present reasons why he should not be removed from his command.[25]

10.31 The committee believes that there can be no excuse for denying members the most basic of rights to know the evidence supporting the decision or proposal to take adverse action against them. On this most fundamental principle, the ROG process falls short.

Conflicts of interest and the independence of the investigators and decision-makers

10.32 As noted earlier, a member must lodge their redress of grievance with the CO. A situation often develops where the grievance is submitted to the person who is at the very centre of the complaint. This means that ultimately the CO could be in the position of reviewing his or her own decision. For example, the CRA explained that a report about unacceptable behaviour would be investigated and the CO would make a decision as to whether or not the behaviour was unacceptable. It explained that, if the behaviour was unacceptable:

> …the CO would make a decision about what action should be taken…By the time it gets to a redress, if that original complainant wants to submit a redress of grievance, it would be about the decision made by the CO. If the complainant felt that the action taken by the CO was inadequate or inappropriate that would be the subject of the redress. When we are talking about a respondent, there is not really a respondent in terms of the redress other than the CO because it is the CO's decision, action or perhaps failure to act.[26]

10.33 Mr Neil James, Australian Defence Association, underlined the likelihood of a conflict of interest occurring under the current review of decision process. He told the committee:

> Unfortunately, under the administrative provisions a senior officer proceeds administratively against a member and is also the person who hears the member's answer. If the senior officer is involved in the circumstances,

---

24 Confidential *Submission C59*.

25 Attachment 'Review of Defence Actions Related to a Claim for Administrative by…', Confidential *Submission C24*.

26 *Committee Hansard*, 2 August 2004, p. 39.

> there is obviously a conflict of interest. Most lawyers will tell you…that, in most cases, the person being proceeded against has to be very careful about going to the senior officer in question and saying, 'Sir or Ma'am, I think you should disqualify yourself because of a possible conflict of interest,' because if they say, 'I have no conflict of interest,' they are then likely to be even more biased against the person being proceeded against.[27]

10.34 Another witness stated:

> The CO who raises the report controls which documents are disclosed to the member. The same CO also responds to the members rebuttal. This allows the CO to significantly control information that is presented to future decision makers. [28]

10.35 In this witness's view, the protections supposedly in-built in the ROG process can be easily circumvented.[29] He stated further:

> A CO is able to influence what information and documents are released to the decision maker. In a military environment if any conflict that exists in information presented by a commander and subordinate the commanders assertions will be accepted as truth.[30]

10.36 In noting that the Redress of Grievance Defence Instructions dictate that any ROG goes to the CO even if the complaint is against the CO, a witness argued:

> This situation is flawed as 99% of the time the CO will not admit that he/she has made a mistake and so the resolution process has been delayed by up to a month by a step that is unlikely to succeed.
>
> The situation is also flawed because the CO can choose not to inform his /her immediate superior that a ROG has been submitted against him/her.[31]

10.37 He suggested that the ROG process needs to be amended to allow a member to go to the next person in the chain of command or to an independent civilian agency.[32]

10.38 In support of this general argument, a member who attempted to have administrative action properly investigated through a ROG accepted that the chain of command is a critical feature of the military but was of the view:

> As such subordinates will always be inclined to agree with those more senior than them. Members of the military will never be able to properly investigate other members of the military. I strongly believe that the

---

27 *Committee Hansard,* 9 June 2004, pp. 25–6. See also Mr Allen Warren, *Submission P5B*, p. 3.

28 Confidential *Submission C9*.

29 Confidential *Submission C9*.

30 Confidential *Submission C9*, p. 14.

31 Confidential *Submission C43*.

32 Confidential *Submission C43*, para 26.

> intensely hierarchical nature and relatively small size of the services makes it impossible for each one to investigate itself.[33]

10.39 A number of specific cases were reported to the committee where an inappropriate person was responsible for the ROG. In one particular case, and against the advice of the CRA, a person who was named in the ROG took carriage of the process.[34] Another member also alleged serious failings in her ROG process including missing or falsified documents, delays, not being consulted or interviewed and the willingness of investigators to accept unquestioningly the word of a senior officer. She was of the view that the first step to right any wrong must begin with 'minds which are open to the fact that just because it is in writing from a senior officer, it may not necessarily be true'. She concluded:

> All the recommendations regarding procedures, and even implementation of them, cannot ensure that those who are charged with responsibility will be open minded, honest, skilled in investigation, demonstrate integrity and most importantly, have the courage to pursue the truth.[35]

10.40 This criticism was not confined to the investigation officer. One member identified conflicts of interest that go beyond the actual investigation. He had no substantial complaints about the investigating officers and the investigation following his ROG, but with the role of the appointing officer in overturning important findings. He explained:

> Two very experienced investigating officers listened to hours of evidence and considered their findings carefully, only to have all their findings that were in my favour overturned by the Appointing Officer, whilst the same individual endorsed all their conclusions that protected either the office of the Chief of the Air Force or the Commonwealth's interests.[36]

10.41 The member believed that the appointing officer should not have been selected because he was the immediate supervisor and the ROG 'directly implicated him in failing to fulfil certain due process functions'.[37] He could not understand why the appointing officer did not withdraw immediately upon commencing his review of the investigating officer's report once he realised that he was implicated in the report.[38] He asked, 'if we can have two civilian investigating officers, who were both military reserve officers, then why can't we have an Independent Reviewing or appointing officer drawn also from the military reserve?'[39] He concluded that, had a 'truly

---

33 Confidential *Submission C8*, p. 2.

34 Confidential *Submission C39*.

35 Confidential *Submission C13*, p. 6.

36 Confidential *Submission C24*, p. 12.

37 ibid.

38 Confidential *Submission C24A*, Addendum 1, Attachment 14, p. 16.

39 Confidential *Submission C24*, p. 12.

independent appointing officer been nominated, then much of the perception of irregularity would have been avoided'.[40]

10.42 As noted on a number of occasions in this report, the need to observe due process is spelt out clearly and unambiguously in numerous Defence manuals. Yet, the adherence to the rules underpinning procedural fairness is not always observed and the safeguards built into the military justice system are not always sufficiently robust to offer the necessary protection to members. Indeed, the lack of independence of the investigator and the decision-maker appears to be one of the most corrosive influences undermining the application of the principles of natural justice and one of the most commonly cited concerns.

10.43 Closely tied to this matter of conflict of interest coming out of the chain of command structure is often the lack of support and, in some cases, blatant opposition to a member submitting a redress of grievance. One member recounted how a fist was put into his face by the administrative officer who asked why he was pursuing a ROG.[41]

Assistance when preparing a complaint

10.44 Equal bargaining positions is an essential guarantee of the right to defend oneself against adverse allegations. It means that those answering the allegations are in a procedurally equal position to the party making the allegation and, are in an equal position to defend their interests. In the case of a notice to show cause or an ROG, the person having to answer the notice or appeal against a decision is pitted against the considerable resources of the ADF as well as the authority, status and influence of senior officers who often are defending their own decision. One witness observed that:

> …the 'weight of coercive legislation and organisation can be brought to bear on any individual soldier who must face it with his personal resources of resolve, time, money and strength'. [42]

10.45 It is therefore critical that the fundamental principles of procedural fairness are observed. A member may request assistance when preparing a complaint. Defence instructions advise that 'unless this assistance is of a legal nature, the CO will nominate a suitably qualified member from within the unit to provide assistance to the complainant'.[43] Defence instructions further direct that:

> Requests for legal assistance are to be made through the legal office that supports the member's unit and are subject to the reasonable availability of a legal officer. The type and duration of legal assistance to be provided to a

---

40 Confidential *Submission C24*, p. 12.

41 Confidential *Submission C18*, p. 2.

42 Confidential *Submission C40A*.

43 Defence Instructions (General) PERS 34-1, Redress of Grievance-Tri-Service procedures, Annex B, para. 5.

> member must be approved by the legal office that supports the unit, in accordance with current policies and directions from The Defence Legal Service. The role of a legal officer appointed to assist the member in the preparation of a ROG is to provide specialist advice concerning the grounds for complaint. The legal officer is not to conduct an inquiry or investigation into the complaint, or negotiations on behalf of the member, without authorisation from the legal office, which will only be given in exceptional and complex cases.[44]

10.46 One witness, however, criticised the Defence Legal Service (TDLS) for being out of touch with current developments in military justice:

> The traditional approach to investigations taken by TDLS refuses to acknowledge that the most vexed area in Defence today are administrative inquiries into personnel and operational matters. TDLS's approach is out of the ark; it does not reflect community standards and expectations as to how members under investigation should be treated, and it does not adequately accommodate administrative law requirements.[45]

10.47 The responsibility for mounting a defence in a ROG rests solely with the aggrieved member. A member who chooses to obtain legal assistance from a civilian lawyer in preparing or pursuing a ROG is liable for any costs incurred.[46] Defence instructions stress that:

> The onus is on the member to ensure that all evidence in support of the complaint is presented to the CRA. It is not the role of the CRA to act as an advocate for the member and the case officer will not normally seek additional evidence solely for the purpose of strengthening the member's case.[47]

10.48 Keeping in mind the difficulties that a member may have in producing relevant documentation as shown in the previous section as well as the potential conflicts of interest inherent in the command structure of the Forces, the ADF has an obligation to ensure that a member is not unfairly handicapped in defending his right to a fair hearing. It must ensure that a member has available to him or her adequate resources to answer the case against them including appropriate legal advice. The committee has noted the criticism levelled at TDLS for its failure to grasp the importance of making adequate legal advice available to ensure that investigations are fair and proper.

---

44 Defence Instructions (General) PERS 34-1, Redress of Grievance-Tri-Service procedures, Annex B, para. 6.

45 Confidential *Submission C49*, para. 16.

46 Defence Instructions (General) PERS 34-1, Redress of Grievance-Tri-Service procedures, Annex B para. 7.

47 Defence Instructions (General) PERS 34-1, Redress of Grievance-Tri-Service procedures, Annex B, para. 12. Note this sentence is in bold. See para 9.20 in this chapter for some background on the CRA.

Competency of investigators

10.49 The quality of investigations was discussed at length in the previous chapter. The criticism was directed at matters such as deficiencies in evidence gathering and analysis, failure to observe natural justice principles, bias in the processes and lack of objectivity. Such shortcomings were also evident in the investigations undertaken under the notice to show cause and the redress of grievance. In particular, evidence suggested that these processes did not provide a genuine review function with some investigators relying uncritically on the findings of previous investigations or reluctant to change earlier decisions.[48]

10.50 With regard to the ROG process, the training of CRA personnel was also found wanting. One witness maintained that 'the personnel who are charged with making important decisions about peoples' lives appear to be ill qualified to do so.' She suggested that it 'should be mandated that as part of the ROG process, an independent legal practitioner reviews each case, in its entirety'.[49] In the view of another witness, the CRA is 'unable to always provide fair impartial investigations'.[50] Another believed that Defence authorities 'appear to have provided inadequate resources to the redress system which could, if properly managed, be a valuable asset than a "running sore"'.[51]

10.51 This evidence again highlights the need for the adequate training of investigators.

Delays

10.52 Delay and other organisational failures that frustrate the timely completion of an investigation described in the previous chapters similarly plague the review and appeal processes. The Defence Force Ombudsman noted the time taken to deal with a complaint. He stated:

> Some matters that come to us already have quite an administrative history insofar as the internal investigation and the redress of grievances are concerned. The redress of grievance process can be time consuming and multilayered. There can be delay in our investigation and in getting responses from the department. Delay is the problem.[52]

10.53 One witness stated simply that, in her case, 'the time taken to progress a redress through a commanding officer and then the Complaint Resolution Agency (CRA) is measured in years, not weeks or months'.[53] She attributed the delays to a

---

48 Confidential *Submission C14*, p. 3.

49 Confidential *Submission C8*, p. 3. Also confidential *Submission C9*, p. 15.

50 Confidential *Submission C9*, p. 15.

51 Confidential *Submission C14*, para. 7.3.

52 *Committee Hansard*, 9 June 2004, pp. 1–4.

53 Confidential *Submission C8*, p. 2. Similar complaints were raised by a number of members.

chronic shortage of personnel in CRA to investigate redresses, the failure to take redress of grievances seriously and the lack of incentive for units to participate in the process in an expedient manner.[54] Unnecessary hold-ups can start with the lodgement of a redress of grievance. One witness claimed that the ROG had been lost while another discovered that his ROG had not been sent to the CAF as previously advised by his former CO.[55] One former member stated:

> I have long been heavily patronised and stonewalled in my quest to achieve this Redress of Grievance.[56]

10.54 Another ADF member explained that he had submitted his claim for defective administration on 8 August 2002 but had received no acknowledgement from the Delegate. He submitted official hasteners in March and September 2003 and received three written assurances of completion dates, none of which were met. He then stated that, in March 2004, he wrote to the Minister for Defence and, on his hastening, received a 'rapid, non-analytical and flippant response from the Delegate denying any claim'.[57]

10.55 Delays can cause particular hardship for those waiting for a decision on proposed adverse administrative action. Difficulties can arise between the period that adverse action is proposed and the findings of an investigation following a redress of grievance. One witness stressed the fact that members 'suffer detriment from the day the action is raised'. She explained:

> In some cases they can be removed from their duties after being informed that action will take place. It may actually take weeks even months before the action is officially raised and then take many months for the process to take place.[58]

10.56 In one case a soldier, implicated in the use of illicit drugs, was issued with a notice of termination. He made a submission noting a number of major flaws in the investigation. While waiting for the redress of grievance process to be completed, he had been subject to adverse administrative action including denial of Christmas and holiday leave, removal of living-off base privileges resulting in financial loss and restriction of active duty. Of most concern to his parents, however, was the physical and emotional isolation experienced by their son:

> Our son and other members who continue to appeal their termination remain in a holding platoon and are denied the opportunity to undertake normal duties. In effect this means that for however long this appeal

---

54 Confidential *Submission C8*. Confidential *Submission C15* was concerned with the delay in processing the Notice to Show Cause.

55 Confidential *Submission C56* and Confidential *Submission C57*.

56 Confidential *Submission C51*, p. 2.

57 Confidential *Submission C62*, p. 2.

58 Confidential *Submission C8*.

> process continues (maybe several years), these young men are sitting idle and are being denied the opportunity to actively participate in army life and their chosen career.[59]

10.57 Overall, the evidence received by the committee suggests that the ROG process in particular is riddled with deficiencies. Indeed, one former member remarked that his 'sustained attempt to obtain a redress has generated further grievances'.[60] The experiences of a high ranking officer with 35 years distinguished service highlighted just some of the problems with the ROG. He told the committee:

> I contend that I was the victim of non-adherence to due process… intimidation tantamount to harassment…unjustified constraint on my employment in my career profession and permanent damage to my reputation and employment prospects.[61]

10.58 This view was supported by an even more damning assessment of the ROG from another high ranking officer who submitted that his case:

> …chronicles a sombre litany of abuse, covering a spectrum of lies, deceit, abrogation of duty, abuse of power, denial of natural justice, failure to follow due process, and finally gross defective administration.[62]

10.59 The extreme difficulties endured by these two individuals both of star rank, men with a thorough knowledge and understanding of the military justice system and with the tenacity to pursue a ROG regardless of the frustrations and troubles, can only emphasise the ordeal that young ADF members might confront in seeking redress. The committee has no doubts that the avenues for review and appeal available to ADF members not only fail to deliver a fair and proper process but can also create unnecessary hardship for those who pursue this course of action.

10.60 The evidence presented in this chapter shows clearly that the problems evident in the investigating officer inquiries and Boards of Inquiry flow into the review processes—conflicts of interest, lapses in procedural fairness, poorly conducted investigations and delays. In other words, the evidence given in relation to the review and appeal processes builds on that applying to other administrative inquiries.

10.61 The committee acknowledges that much of the evidence presented in this chapter is drawn from confidential submissions which have not been made public let alone provided to Defence for comment. It should be noted that the committee would have preferred all evidence presented to it during this inquiry to be made freely available for public debate. This lack of openness has severely limited the ability of

---

59 Confidential *Submission C6*.

60 Confidential *Submission C14*, p. 2.

61 Confidential *Submission C62*, p. 3.

62 Confidential *Submission C24*.

the committee to test the veracity of this evidence. The committee accepts this limitation. It notes, however, that this confidential material builds on a solid body of evidence presented in the previous chapters that has clearly identified failings in the administrative system.

10.62 The committee decided not to make the submissions public for a number of reasons. Firstly, in many cases the evidence reflected adversely on named individuals and the committee wanted to respect people's rights to privacy. Secondly, some submitters requested that the circumstances of their particular case be kept confidential because they feared some form of reprisal. Thirdly, a number of the cases had not been resolved, and the committee deemed it inappropriate to discuss openly cases still under consideration or subject to negotiation. Finally, some people did not wish to bring the ADF into disrepute by publicly airing their grievances. One serving member stated:

> I remain a dedicated, loyal and long serving officer. It therefore gives me absolutely no pleasure or gratification to make this submission which is likely to be perceived by many within the Australian Defence Force (ADF) as inappropriate and in conflict with the nature of my employment and long established military protocols. For over 27 years I have been inculcated with the need to remain apolitical and render unqualified service to the Government of Australia and its citizens. Accordingly, I considered it inappropriate for me to be a member of a political party, make public comment on Government policy, openly discuss military affairs, or be a member of any association which holds or promotes a political agenda—until now.[63]

10.63 Having taken this significant step in lodging a submission with the committee, he was not prepared to go any further and requested that the committee treat his submission as confidential and for it be withheld from public scrutiny. In this chapter, the committee has also cited the case of two highly ranked ADF officers who, according to their evidence, have endured extreme difficulties in pursuing their case, including intimidation, denial of natural justice, and damage to career and reputation. Despite this treatment, they, too, did not to want to sully the public standing of the ADF and its members by making their complaints public. The evidence provided by these three officers is compelling and reinforces each other's conclusion that the ROG system is seriously flawed. Their evidence is also consistent with, and further validates the evidence from members and former members presented in this chapter which was highly critical of the ROG process.

10.64 A number of suggestions were put forward by witnesses that specifically address the problems identified with the appeal and review process. They include:

- the use of sworn statements in the raising of administrative action which would help ensure that claims made by the CO are truthful and accurate;

---

63 Confidential *Submission* C37, Foreword.

- the requirement to make a sworn statement that all relevant evidence has been disclosed which would reduce the likelihood that documents are not disclosed to the member;
- the automatic legal review of adverse administrative decision which would be independent and binding and could eliminate delays in reaching an outcome; and
- priority given to administrative decisions affecting a member's livelihood.[64]

10.65 The committee sees merit in such suggestions but, in light of the range and seriousness of the deficiencies in the current system, believes that a comprehensive restructuring is required.

Recent initiatives and the role of the Complaints Resolution Agency (CRA)

10.66 According to the Department of Defence, the CRA has taken steps to improve the operation of the administrative system. It has taken on the role of monitoring unit-level redress of grievance investigations to reduce delays. According to the CRA it:

> …is proactive in offering advice to unit commanders on how to deal with complaints, and is also consulted regularly by unit staff who may be unsure of the process and its requirements.[65]

10.67 Indeed, General Cosgrove was of the view that 'significant progress continues to be made to improve the openness and external scrutiny of the administrative system, including inquiries.'[66] He regards the current system of internal checks and balances, of review and counter review, of appeal and counter appeal as 'extraordinarily resilient.'

10.68 The committee is mindful of the assurances given by the ADF of the recent steps taken to improve the internal review and appeal process. Even so, it is aware that the experiences of many participants in the inquiry run contrary to the official view as presented by General Cosgrove. There can be no doubt based on the evidence before this committee that the internal review and appeal processes manifest the same deep seated flaws as those evident in the investigating officer and BOI investigations. They include cases where there were:

- serious failings to adhere to the fair hearing rule in that:
  - members were not informed that adverse action was being taken;
  - members were not provided with all material relevant to the decision taken to impose adverse action including documentation that would

64 Confidential *Submission C9*, p. 14.

65 *Submission P16*, p. 45.

66 *Committee Hansard*, 1 March 2004, p. 9.

assist them in building their defence—some members had to battle to gain access to relevant material;

- members were not provided with an effective opportunity to present a case;

- failures by the reviewing body to consider all relevant evidence;
- conflicts of interest involving the reviewing authority that cast serious doubt on the objectivity and independence of the proceedings, particularly where an individual was reviewing his or her own decision;
- inadequacies in the training and experience of those responsible for investigating a grievance or overseeing the ROG;
- delays in processing complaints; and
- improper tactics used to dissuade members from proceeding with their grievance including conduct intended to frustrate the process.

10.69 The committee accepts that, on paper, there is 'a system of internal checks and balances, of review and counter review'. The overall lack of rigour to adhere to the rules, regulations and written guidelines, the inadequate training of investigators, the potential conflicts of interest and the inordinate delays in the system rob it of its very integrity. The committee believes that measures must be taken to build greater confidence in the system and most importantly to combat the perception that the system is corrupted by its lack of independence.

10.70 Before discussing proposals to address these shortcomings, the report examines the roles of the IGADF and the Defence Force Ombudsman in the following chapter.

Chapter 11

The IGADF and the Defence Force Ombudsman

11.1 The previous chapters identified a long list of perceived flaws in the conduct of routine and investigating officer inquiries and inquires undertaken as part of a review or a redress of grievance. One of the main concerns was the apparent lack of independence. There are now a number of review mechanisms that stand outside the chain of command—the newly created Inspector-General of the Australian Defence Force and the Defence Force Ombudsman—that are intended to provide a greater degree of objectivity and impartiality to the military justice system. This chapter considers their roles and functions and the contribution they make to the effectiveness of this system.

Inspector-General of the Australian Defence Force (IGADF)

11.2 The ADF looks to the newly appointed Inspector-General of the Australian Defence Force (IGADF) to counter criticisms about the perceived lack of independence in its administrative system. Its establishment stems from recommendations contained in the Burchett Report which suggested that:

> A Military Inspector General independent of the normal chain of command and answering directly to the CDF would provide greater assurance of independence for those cases where complaints do need to be brought forward. [1]

11.3 The main function of the IGADF is to provide the CDF with an internal review of the military justice system, separate from the normal chain of command, and 'to provide an avenue by which failures in the system—systemic or otherwise—may be examined.'[2] According to General Cosgrove, recent initiatives such as the establishment of an IGADF provide an additional 'failsafe layer' in the military justice system.[3] He stated that the IGADF offers an opportunity for independent review. [4]

---

1 Report into Military Justice in the Australian Defence Force, conducted by Mr J.C.S.Burchett, QC, An Investigating Officer appointed by the Chief of the Defence Force, under the Defence (Inquiry) Regulations 1985, p. 39. The Burchett Report envisaged a Military Inspector General who, among his or her other functions, would provide an avenue for complaints of unacceptable behaviour, including victimisation, abuse of authority, and avoidance of due process where chain of command considerations discourage recourse to normal avenues of complaint. He or she would also have the authority 'to take action as may be necessary to investigate such complaints, or refer them to an appropriate authority for investigation, including the military police, civil police, Service or departmental commanders or authorities'. Following any referral, the IGADF would receive it and, if necessary, report to the CDF on the response of the authority to whom the matter was referred.

2 *Committee Hansard*, 1 March 2004, pp. 57–9.

3 *Committee Hansard*, 1 March 2004, pp. 30–1.

The Independence of the IGADF

11.4 The Burchett Report stressed that its proposed OIGADF 'must be, and be plainly seen to be, independent of the normal chain of command'. It went on to state:

> It should be directly under the command of the CDF. Thus it will be seen that the Military Inspector General is not susceptible to undue influence by anyone in a chain of command. This does not mean that the position would have to be completely outside the Australian Defence Force and the Department of Defence…It does mean, however, that the Military Inspector General should be seen as a distinct entity from the three Services and from the principal joint organisations, under which all military personnel are administered.[5]

11.5 The Burchett Report stated further that:

> The Military Inspector General will require to be a figure who can actually maintain independence. For that reason, the appointee should ideally not be a person who could be thought to have career expectations in Defence. Of course, the appointee should have a close familiarity with the Australian Defence Force environment or should be at the apex of a highly expert staff with that familiarity. An understanding of the military justice system would be essential.[6]

11.6 The appointment of the IGADF is in keeping with the findings of the Burchett report. He or she does not hold military rank although for administrative purposes the position equates with Senior Executive Service Band 2. He or she reports to the CDF and, according to Defence Instructions, 'is independent of the normal ADF and public service chain of command or line management'. Defence Instructions advise that:

> This arrangement is intended to allow the IGADF to undertake his/her duties impartially and to counter any perceptions of undue influence arising in relation to matters under consideration by the IGADF.[7]

11.7 They make clear that the 'establishment of the OIGADF is not intended to duplicate or displace the functions of other such agencies or appointments but rather

---

4 *Committee Hansard*, 1 March 2004, p. 9.

5 Report into Military Justice in the Australian Defence Force, conducted by Mr J.C.S.Burchett, QC, An Investigating Officer appointed by the Chief of the Defence Force, under the Defence (Inquiry) Regulations 1985, p. 165.

6 Report into Military Justice in the Australian Defence Force, conducted by Mr J.C.S.Burchett, QC, An Investigating Officer appointed by the Chief of the Defence Force, under the Defence (Inquiry) Regulations 1985, p. 166.

7 Defence Instructions (General) ADMIN 61-1, Inspector-General of the Australian Defence Force – role functions and responsibilities, para. 6.

should be regarded as complementary to them'. The IGADF's role is unique in that, unlike other agencies, its focus is on the military justice system as a whole.[8]

11.8 In response to committee concerns about the independence of the IGADF, Mr Earley noted:

> Mr Burchett's visions and his recommendations were never that the office of IGADF would be completely independent in the sense of being external to the defence department entirely, like the Ombudsman. He envisaged it being independent of the normal chain of command but responsible to the CDF—and only the CDF. I am not responsible to any of the service chiefs, only to General Cosgrove.[9]

11.9 He explained further that the office does not purport to be, and was never intended to be, independent in the sense of being completely external to the Defence Organisation. In his opinion:

> Given its role, the present arrangements of being aside from and yet at arms-length to and not divorced from the ADF offers advantages which, in my view, are unlikely to be available had the office been established completely externally. This includes the ability to move freely within the Defence Organisation to go directly to the relevant area of interest and to operate with and under the authority of the CDF. In a hierarchical structured organisation such as the ADF, they are pretty important considerations. They are important, in my view, because they greatly assist the office to perform its function in a way which lessens the risk of resentment arising from a lack of awareness of cultural factors while at the same time allowing an arms-length impartial approach.[10]

11.10 The committee notes that the IGADF does not have executive authority to implement measures arising out of his or her investigations. The IGADF's only authority is 'to make recommendations to other authorities who may remedy the matter'. The IGADF may, however, report the outcome of his or her inquiry, including the adequacies of any responses, to the CDF.[11] The committee is concerned that there are inadequate measures in place that would hold the CDF publicly accountable should he or she fail to act in part or in full on a recommendation by the IGADF. For example, there is no requirement for the CDF to provide written explanations to the IGADF for rejecting recommendations which would for example enable the IGADF to comment on any concerns related to such matters in his or her annual report.

---

8 Defence Instructions (General) ADMIN 61-1, Inspector-General of the Australian Defence Force – role functions and responsibilities, para. 8.

9 *Committee Hansard*, 5 August 2004, p. 88.

10 *Committee Hansard*, 1 March 2004, pp. 57–9.

11 Defence Instructions (General), Inspector-General of the Australian Defence Force—role, functions and responsibilities, para. 34.

11.11 The committee believes that such a requirement for the CDF to notify the IGADF in writing where the CDF does not accept a recommendation should be explicitly stated in paragraph 34 of the Defence Instructions (General): Inspector-General of the Australian Defence Force—role, functions and responsibilities.

11.12 In the context of his status as an independent body, the IGADF elaborated on the nature of his employment conditions:

> …at CDF's direction, action is being taken to move my position of IG ADF from a contractual basis, where it now lies, to a legislative basis. The intention is that the basic role, structure and reporting arrangements, which have actually proven to be quite effective, will remain as presently established, except that the authority for it will have a legislative or statutory basis at some time in the future. I think the earliest, optimistically speaking, that that might happen is probably legislation to go before the autumn sittings next year…The object there is to enhance the perception and the reality that the IG ADF and his office are independent from the normal chain of command.[12]

11.13 In May 2005, when asked about progress toward placing the appointment and employment conditions of the IGADF on a statutory basis, Mr Mark Cunliffe, Head Defence Legal, informed the committee that a bill was proposed for introduction in the June 2005 parliamentary sittings. When pressed on this matter, Mr Cunliffe stated that he did not know exactly how much of the bill was drafted but it 'certainly has been in various draft versions.' He went on to say that 'There have been policy clearance procedures in place in relation to some parts and that is continuing'. The Minister for Defence noted that it has taken four years of drafting to get to this point which, in his view, was 'a very long time.'[13]

11.14 As observed by the minister the progress toward moving the IGADF from a contractual basis to a legislative one has been slow. This delay in placing the IGADF's appointment and employment conditions on a statutory base weakens any attempt by the Government and the ADF to convey a positive message about the purported independence of the IGADF.

The accessibility of the IGADF

11.15 In establishing the IGADF, the Government and the ADF recognised that there may be occasions when individuals feel they are unable or are reluctant to report their concerns through the chain of command. Even so, the office takes the approach that it does not offer 'a short cut for complainants'. Its objective is:

> to allow and encourage the normal systems for dealing with failures in the military justice system to operate first. If there is some specific reason why

---

12 *Committee Hansard,* 5 August 2004, p. 87.

13 Senate Foreign Affairs, Defence and Trade Legislation Committee, *Hansard,* 31 May 2005, pp. 69–70.

> they cannot or if a member feels that for some particular reason they are unable to access the normal systems, that brings into being the sort of role that we can play.[14]

11.16 Submissions may be made to the IGADF where:

- the person making the submission believes that they, or any other person, may be victimised, discriminated against or disadvantaged in some way if they make a report through the normal means;
- the person making the submission has no confidence that the chain of command will properly deal with their Military Justice concern, for instance, if the chain of command is perceived to be part of the problem; or
- the established complaint mechanisms for specific Military Justice issues or the chain of command have been tried and have failed to address properly the problem.[15]

11.17 Persons may make submissions whether of a systemic or individual nature that relate to the processes and arrangements under which military justice is administered. They may be concerned with matters such as:

- abuse of authority;
- abuse of process;
- procedural fairness/denial of natural justice;
- avoidance of due process and specified procedures;
- failure to act;
- unreasonable delay;
- unlawful punishments;
- victimisation, harassment, threats, intimidation, bullying and bastardisation; and
- general suggestions regarding the military justice system particularly in relation to examples of systemic failure and/or suggestions for improvement.[16]

11.18 Under this reporting framework, individuals may make anonymous submissions. The Manual notes, however, that:

---

14 *Committee Hansard*, 1 March 2004, p. 7.

15 Defence Instructions (General) ADMIN 61-1, Inspector-General of the Australian Defence Force—role functions and responsibilities, para. 17.

16 Defence Instructions (General) ADMIN 61-1, Inspector-General of the Australian Defence Force—role functions and responsibilities, para. 19. This list is based on that given in the manual. The manual notes that the list is illustrative and not exhaustive.

> …such submissions are regarded as being informative rather than evidentiary which means that the scope for taking further action may be more limited than if the person makes their identity known to the IGADF staff. Nonetheless investigation of the allegations will be assisted by the provision of as much information as possible about the subject of the complaint. Persons who make anonymous submissions cannot, since their identity is unknown to the IGADF, be provided with feedback information concerning the progress and outcome of their submission.[17]

Protection of those making submissions to the IGADF

11.19 Defence Instructions recognise that in some cases persons making submissions to the IGADF may fear for their safety, security, career or general well-being. It advises that support and protection mechanisms are available to assist in these circumstances and that IGADF staff 'will liaise directly with the person in order to best determine the nature and level of support and protection required in each case'.[18]

11.20 The committee refers to the Defence Whistleblowers Scheme which also provides for a person to be assigned to a case to ensure that the person making a report does not suffer reprisals on account of making a report. It is concerned that confusion may be created about who has responsibility for the protection of people reporting wrongdoing or making a complaint. It has suggested that the reporting system be streamlined.

Delays in processing a grievance

11.21 The IGADF, which was established in January 2003, started from scratch and, according to the IGADF, early indications are that it is beginning 'to make a positive difference and is shaping up…to be a most worthwhile and important initiative for military justice in the ADF'.[19]

11.22 Because the position is newly created, few witnesses had used the new system and were not able to make any substantial comments about the role and function of the IGADF. A number approved of the establishment of the office with one observing that 'it appears that investigations may take place without the chain of command influence that is present for the ROG process.' Even so, she identified a number of potential problems, in particular the requirement for the ROG process to be exhausted before the IGADF can address a matter.[20] Given the delays that afflict the ROG process, complainants may still have to endure prolonged periods before final decisions are

---

17 Defence Instructions (General) ADMIN 61-1, Inspector-General of the Australian Defence Force—role functions and responsibilities, para. 36.

18 Defence Instructions (General) ADMIN 61-1, Inspector-General of the Australian Defence Force – role functions and responsibilities, para. 39.

19 *Committee Hansard*, 1 March 2004, pp. 57–9.

20 Confidential *Submission C8*, pp. 3–4.

made causing what one witness described as 'enormous stress and heartache to the member involved and their family'.[21]

11.23 In establishing the IGADF, no serious steps were taken to break the cycle of delay that frustrates the ROG process such as empowering the IGADF to intervene in order to expedite the conclusion of an ROG that has stalled in the system. Paragraphs 17 or 18 of the Instructions Manual could state explicitly that a person may submit their grievance to the IGADF if its progress has been delayed and could even stipulate the time at which the IGADF could intervene.

Early days for the IGADF

11.24 The committee acknowledges that it is far too early to evaluate whether the establishment of the IGADF will prove to be an effective review mechanism. It notes the heavy emphasis placed on settling matters under the administrative system using the chain of command, line management or other specialised agencies at the lowest possible level. The committee is concerned that unless the IGADF shows a willingness to act and does act decisively and promptly to accept submissions that have legitimate grounds for by-passing the line of command, it will lose credibility as an effective force in the administrative system.

11.25 As noted previously, the position of IGADF has only recently been established and it is too early to make any certain judgements about its effectiveness. One witness, however, who had lodged a submission with the IGADF was disappointed and noted:

- there was no initial confirmation of receipt of submission;
- the lack of response became a regular feature of interaction with some requests left unanswered;
- the requirement to resubmit submission as the original could not be located;
- case officer had a poor understanding of the case; and
- the IGADF could do nothing until the ROG process had been finalised.[22]

11.26 The committee believes that, although these could be examples of teething problems, the criticism underlines the importance of monitoring the performance of the IGADF.

11.27 In light of the failings of the current administrative system as identified in this report, one of the major challenges facing the IGADF is to win the trust and confidence of members of the ADF. Any suspicion that the office is susceptible to the influences of senior levels in the ADF will undermine its credibility. It must be seen to

---

21 Confidential *Submission C8*, p. 4.

22 Confidential *Submission C57*.

stand apart from the command structure, to be committed to the principles of procedural fairness and to be a professional organisation with adequate resources and staff equipped with the skills and training necessary to process grievances or complaints competently and expeditiously. This is a sound reason for providing the IGADF with effective reporting procedures.

Reporting obligations

11.28 A reporting regime that is transparent and promotes accountability would greatly improve the perceived independence of the Office of the IGADF. As noted earlier, the IGADF reports directly to the CDF. The IGADF is required to provide the CDF with internal audit and review of the military justice system independent of the ordinary chain of command. [23] There does not appear, however, to be any adequate avenue for the IGADF to air his or her concerns about the military justice system to any authority other than the CDF.

11.29 Mr Earley informed the committee that the original intention was that there would not be an annual report to the parliament. It has now been agreed, however, that there will be a section in the annual Defence Report which will relate to the office.[24]

11.30 The committee argues for a separate IGADF's report independent of Defence's annual report. It believes that the reporting obligations placed on the IGADF must allow public scrutiny. The current reporting requirements do not offer any real guarantees that the information provided would be sufficient to allow effective parliamentary scrutiny. The committee refers to the Defence Force Ombudsman's report for the years 2000–01 and 2001–02. They provide a critical and comprehensive assessment of the complaints it received as well as a number of case studies which provide some insight into the nature of the complaints. This report provides an ideal model for the IGADF.

Measures taken to improve the competency of investigating officers

11.31 The committee notes the initiative taken by the IGADF to improve the competence of investigating officers. Defence Instructions state that the IGADF:

> …will maintain a register of persons considered suitable by training and/or experience to act as investigating officers, or members of administrative inquiries. Personnel listed in the register may be used by the IGADF for administrative investigations, but will also be available on request to other Appointing Authorities including Commanding Officers. The objective is to

---

23 Defence Instructions (General) ADMIN 61-1, Inspector-General of the Australian Defence Force – role functions and responsibilities, para. 11. It states 'The IGADF will provide an avenue by which any failure of Military Justice may be examined and exposed, but not so as to supplant the existing processes of review by the provision of individual remedies, but in order to make sure that review and remedy are available and that systemic causes of injustice (if they arise) are eliminated.'

24 *Committee Hansard,* 5 August 2004, p. 98.

> establish a pool of suitably qualified persons who understand the administrative inquiry process and the attendant legal and procedural obligations and who are capable of conducting, or taking part in, an administrative inquiry under the Defence (Inquiry) Regulations 1985.[25]

11.32 The IGADF is sponsoring a pilot training course for administrative inquiry officers with the object of producing a 'larger pool of officers with a good understanding of how to go about conducting an administrative inquiry'.[26] It has established a register of inquiry officers drawn from the three services. The IGADF has also under development, and has volunteered to manage, a reporting system whereby all administrative inquiries above the level of investigating officer are to be centrally reported to the office of the IGADF. Mr Earley told the committee:

> …the implementation of recommendations and outcomes from those inquiries could undergo some scrutiny and some monitoring, which currently is a bit of a difficult area and, as I think most people would agree, needs some attention.[27]

11.33 The committee endorses the measures taken to improve the competence of investigating officers, to develop a register of investigators, and to establish a central reporting system for administrative inquiries (see recommendation 29, para. 11.67)

Other external review mechanisms

11.34 In addition to the internal review mechanisms available to ADF members, there are a number of external review mechanisms: the Defence Force Ombudsman (DFO), the Privacy Commissioner and the Human Rights and Equal Opportunity Commission. Furthermore, conduct and decision making in the ADF may be subjected to external judicial review in the Federal Court and thereafter in the High Court.[28]

Defence Force Ombudsman (DFO)

11.35 General Cosgrove expressed his concern with proposals that would move involvement in the military justice system away from the command structure:

> If disciplinary action is taken in respect of an offence, then there is also legal protection, such as the right to a defence, under the Defence Force Discipline Act. We cannot afford to breed a generation of risk adverse commanders who are so concerned about being second-guessed that they do not act at all. Our junior leaders are trained to demonstrate their initiative and to exercise a high level of responsibility. They have shown themselves to be very good at it. They know that with responsibility comes

---

25 Defence Instructions (General) ADMIN 61–1, Inspector-General of the Australian Defence Force—role, functions and responsibilities, para. 50.

26 *Committee Hansard*, 5 August 2004, p. 86.

27 *Committee Hansard*, 5 August 2004, p. 99.

28 *Committee Hansard*, 1 March 2004, p. 9.

> accountability. The more we shift the responsibility for military justice away from the chain of command, the more we risk undermining both systems.[29]

11.36 Even so, he acknowledged that 'despite the Forces' best efforts some cases of poor administration will inevitably occur'. According to the CDF, in such cases, the Ombudsman is 'a valuable external point of review for ADF members unsatisfied with the results or conduct of a grievance investigation, and the support of that office continues to be appreciated.'

11.37 In 1983 the Ombudsman Amendment Bill was passed creating a statutory office of Defence Force Ombudsman with much the same powers as the Commonwealth Ombudsman. It recognised that servicemen and women at that time did not have access to complaint handling mechanisms that other Australians in civilian employment enjoy such as representation through union membership or access to arbitration processes.[30] The legislation was intended to provide an important step forward in the conditions of employment for ADF members. Mr Willis, then Minister for Employment and Industrial Relations and Minister assisting the Prime Minister for Public Service Matters, informed the House that:

> Servicemen and women differ from most other Australians in that their relations with their employers can extend into almost every aspect of their lives. It is in the nature of Defence Force service that members do not have the advantage of external grievance mechanisms typical in civil employment. With the creation of a Defence Force Ombudsman an independent avenue for the review of grievances will be established.[31]

11.38 The amendment proposed that the office of Defence Force Ombudsman be established within the Ombudsman Act as a complement to the Ombudsman's jurisdiction. The office, however, was to be identifiable and distinct.[32] It conferred on the Defence Force Ombudsman the function to investigate, either on complaint being made or of his or her own motion, administrative actions related to or arising out of a person's service in the Defence Force.

11.39 The legislation acknowledged that 'For effective management in the Defence Force, officers should usually hear and have the first opportunity to remedy the grievances of those under their command'.[33] It envisaged that the Defence Force Ombudsman would complement, rather than compete with, existing internal redress procedures.

---

29 *Committee Hansard,* 1 March 2004, p. 7.

30 Administrative Review Council, *Report to the Attorney-General, Defence Force Ombudsman,* Canberra 1981, p. 5.

31 Second reading speech, Mr Willis, *House Hansard,* 26 May 1983, p. 1021.

32 See second reading speech, Mr Willis, *House Hansard,* 26 May 1983, p. 1021.

33 ibid.

Independence of the DFO

11.40 One of the major strengths of the Defence Force Ombudsman is its independence from the Defence Force. Mr Ron Brent, Deputy Ombudsman, explained:

> …we are independent and impartial. That very significantly changes the character of the review not just because it gives us a capacity to view issues with a freshness and an independence that you just cannot get with the system but also because it presents to the complainant an impartial and dispassionate review so that, even if the outcome is that we uphold the original decision, the fact that we have come to that conclusion can be a significant factor in satisfying the complainant that they have been fairly treated. One of the features of the Ombudsman's office is that we are independent and do carry that sort of status and credibility.[34]

11.41 He also identified a second strength:

> …while the rate at which we find complaints to be upheld is relatively low, often the complaints that we do find upheld are very significant. Therefore, the measure of our value added is not in the percentage of cases where we find a mistake; the measure is in looking at the nature of the mistakes and at the quality of the contribution we can make. Often the issue will be a more significant problem because, were it a simple problem, the internal grievance processes would have been able to deal with it. Where the problem lies in the character of the system or in the character of the structures, the administrative processes or the legislation, we become more significant.[35]

11.42 Although the Defence Force Ombudsman jurisdiction is limited to making recommendations, he was confident that 'the legitimacy of our involvement in that area has been accepted'.[36] He noted that his role of Defence Force Ombudsman was not well known in the forces.[37]

Constraints on the DFO

11.43 The current Defence Force Ombudsman, Professor John McMillan, was of the view that the Ombudsman Act imposed some constraints on the jurisdiction of his office. He explained:

> One is that our jurisdiction does not extend to action taken in connection with proceedings against a member of the Defence Force for a breach being a disciplinary offence, so matters in connection with proceedings for a disciplinary offence are beyond our jurisdiction. That is an elastic concept

---

34 *Committee Hansard*, 9 June 2004, p. 9.

35 *Committee Hansard*, 9 June 2004, pp. 1–4.

36 *Committee Hansard*, 9 June 2004, p. 15.

37 *Committee Hansard*, 9 June 2004, p. 16.

> and by and large we have interpreted it fairly narrowly and declined jurisdiction, for example, once a charge has been preferred against a person. But certainly we interpret our jurisdiction as extending to the inquiries that, for example, can sometimes lead up to or culminate in disciplinary proceedings being brought. And, equally, we interpret our jurisdiction as extending to the administrative actions that are sometimes taken subsequent to or in implementation of decisions made in disciplinary proceedings. [38]

11.44 He also noted, as a further limitation, the statutory presumption in favour of a person first using the internal processes for redress of grievance before the Ombudsman accepts a complaint and investigates. He explained:

> The act says that the Ombudsman can investigate in special circumstances or can investigate once 29 days have expired since the redress of grievance process commenced. In fact…the redress of grievance process can sometimes take a lot longer, so our investigations are commonly delayed for some period by that statutory presumption in the act. We received 722 complaints that fell within the Defence Force Ombudsman role last year.[39]

11.45 The Annual Report noted that the Ombudsman's 2004 Client Satisfaction Survey highlighted that complainants in the Defence Force Ombudsman jurisdiction are 'generally less satisfied with our service than complainants in other jurisdictions'.[40] This is on top of the delays and frustrations experienced in the internal investigation and review processes.

11.46 Witnesses who remarked on the role of the Defence Force Ombudsman identified a number of shortcomings acknowledged by the Ombudsman himself including the inability to investigate a complaint until a ROG process is finalised and the lack of authority to enforce recommendations.[41] The committee notes that this lack of authority is typical of functions of most Ombudsmen. One witness who sought to have his complaint dealt with by the Defence Force Ombudsman was told he would be asked to use the military justice system first. In his view:

> Having to go through the Military Chain of Command first before the Defence Ombudsman deprives staff of the ability to have an independent agency investigate the matter. The situation allows the Chain of Command to cement its position and delay any potentially damaging findings until after the CO/OC have left the job or been promoted.[42]

11.47 Another witness contacted the Defence Force Ombudsman on three separate occasions for help in the progression of his ROG. On each occasion, he was advised

---

38 *Committee Hansard*, 9 June 2004, pp. 1–4.

39 ibid.

40 Chapter 5, Defence, *Commonwealth Ombudsman Annual Report*, 2003–04.

41 Confidential *Submission C8*.

42 Confidential *Submission C43*.

that the Ombudsman could not act until the RAAF had processed and adjudicated on the ROG notwithstanding the effects that the undue delay was causing.[43]

11.48 The CDF and the Defence Force Ombudsman agreed to conduct a joint review of the ROG system with the intention to identify strategies to refine the system.[44]

11.49 The joint review of the ROG system, undertaken by the Department of Defence and the Office of the Ombudsman, recently made public its findings. It underlined many of the conclusions reached in this report. For example, it considered that the rapid increase in complaint handling avenues had 'vastly added to the complexity of managing and administering complaints in Defence'.[45] The review stated:

> Very few complainants and managers appear to understand all of these avenues. Many of these processes have the mandate to examine similar issues, and some may result in executive action such as disciplinary proceedings or sanctions. The Review found that this myriad of systems is not only complex and somewhat bewildering to the user, it must also result in less than optimal use of resources and inefficiencies. The systems have grown in a piecemeal and ad hoc fashion. The current ROG system now lies uncertainly within a complex and poorly understood network of inter-linked processes and mechanisms that make up the military justice system.

11.50 The review made a number of recommendations designed to:

- expand the role of the CRA to include leadership, direction and coordination of all Defence's formal complaint handling systems;
- develop a common information system for complaint management with the ability to provide information in a form that will support Defence wide reporting including information required by the Inspector General (ADF)
- co-locate where possible and centrally manage the numerous agencies that deal with complaints—DEO, Army Fair Go Hotline, Army Land Command Sensitive and Unacceptable Behaviour and Incident Management Section, Directorate of Alternative Dispute Resolution and Conflict Management, Navy's Sexual Offence Support Persons program;
- enhance the process of preliminary assessment by CRA to prevent delays;

---

43 Confidential *Submission C57*.

44 Chapter 5, Defence, *Commonwealth Ombudsman Annual Report 2003–04*.

45 A Joint Report by the Department of Defence and the Office of the Commonwealth Ombudsman, *Review of the ADF Redress of Grievance System 2004,* dated 27 January 2005 but not made public until April 2005, Executive Summary.

- expand the role of CRA to measure, monitor and report the total time taken to address each complaint;
- impose strict timelines for ROGs to be lodged well in advance of an advised termination date;
- improve the approach to prioritisation of ROGs;
- improve the coordination of training in administrative investigations across all ADF courses that currently include elements of investigation and administrative law.

11.51 The committee accepts that the implementation of the recommendations may go some way to address the problems identified in the ROG process. The committee, however, is not confident that the recommendations go far enough especially in light of the failure of initiatives, introduced over the past decade, to redress the problems. The committee, therefore, stands by its view that the time for tinkering with the complaint handling mechanisms is over and a comprehensive reform of the ROG process is required.

Courts and Commissions

11.52 Members may apply to the courts or other institutions such as the HREOC to seek redress from adverse administrative action. The terms of reference did not mention these external review mechanisms and they attracted little comment from submitters. The report notes but does not examine their important role in the military justice system.

11.53 The committee did, however, receive a disturbing allegation that RAAF officers had threatened to take action against a member should that member proceed with court action.[46] The use of intimidation by ADF members to dissuade others from pursuing a complaint or grievance debases the military justice system. The committee has already voiced its concern about the prevalence of unlawful reprisals and urged the ADF to take firm steps to remedy this problem (see paras 7.39–7.59 and 7.76–7.80).

Summary

11.54 This report has identified serious problems with the administrative component of the military justice system. The problems emerge at the very earliest stage of reporting a complaint or lodging a grievance and carry through into the final stages of review or appeal. The problems are not new—they have dogged the system for many years—nor are they confined to specific ranks or areas of the Forces. Young recruits and senior officers, female and male members across the three services engaged in the full range of military activities have given evidence before the committee raising their concerns about the military justice system.

---

46 Confidential *Submission C9*.

11.55 The problems identified by these witnesses are not unique to the ADF. Many countries have grappled with similar difficulties and have taken steps to reform their systems. The Canadian initiatives have particular significance for the ADF.

Looking forward

11.56 The committee is impressed with the reforms that have taken place in the Canadian Forces on the redress of grievance process. The Canadian reforms were intended to compensate for shortcomings in the military justice system—notably a grievance process tied closely to the chain of command with no adequate external checks and a lack of unions or employee associations to represent the interests of members. Indeed, the Canadian reforms address issues similar to those that plague the Australian system—confusion due to the number of bodies that handle complaints or grievances, the perceived lack of independence in the investigators and decision makers and delays in processing a complaint.

11.57 In December 1998, the Canadian Forces Grievance Board (CFGB), an independent, arms-length organisation, was created through amendments to the *National Defence Act.* Prior to these amendments, a grievance could have passed through multiple levels of review. The Act now provides for two levels of authority in reviewing grievances and has effectively made the process 'simpler and shorter'.[47]

11.58 The first level is the initial authority where the CO takes responsibility for reviewing the grievance and granting redress. A person not satisfied with a decision at this level may submit an application for review to the Chief of the Defence Staff. At this second level, grievances, except those related to matters such as performance appraisals, promotions, postings, training and other career issues, are referred on to the CFGB. Thus, the CDF refers to the Grievance Board any grievance relating to matters such as administrative action resulting in the forfeiture of, or deductions from, pay and allowances, reversion to a lower rank or release from the Canadian Forces. Other grievances referred to the Board include matters such as the application or interpretation of Canadian Forces policies relating to expression of personal opinions, political activities, civil employment, conflict of interest and post-employment compliance measures, harassment and racist conduct.[48]

11.59 All Board members of the CFGB are civilians, although some members may have been serving members of the Forces. They are appointed by the Governor in Council for terms not exceeding four years. The Chairperson is a full-time member, is

---

47 Canadian Forces Grievance Board, *Performance Report,* for the period ending March 31, 2002, pp. 6–8. http://www.tbs-sct.gc.ca/rma/dpr/01-02/CFGB/CFGB0102dpr-PR_e.asp?printable_Tr (17 November 2004)

48 This list is not exhaustive. See Canadian Forces Grievance Board, Performance Report for the period ending March 31, 2002; Canadian Forces Grievance Board, Annual Report 2003, p. 6; Canadian Forces Grievance Board, Report on Plans and Priorities for the full period 2003–2004, 2005–2006.

the Chief Executive Officer of the Board, and has supervision over and direction of the work of the Board staff.

11.60 The CFGB has the powers of an administrative tribunal to summon civilian or military witnesses, as well as order testimony under oath, and the production of documents. In the interests of individual privacy, hearings are held in-camera. Nonetheless, the Chairperson may decide to hold public hearings when it is deemed the public interest is at stake. The Board is supported in its work by experts in the fields of labour relations, human resources and the law and is accountable to parliament through annual reporting.

11.61 In 2003, an independent review found that the CFGB had been a positive development especially in conveying the perception of impartiality in the review of grievances. It, however, had not solved the problem of unnecessary delays. The large number of outstanding grievances was deemed to be unacceptable and of serious concern. The report recommended that clear time limits be established for a grievance to proceed through the process.[49]

Proposed new Australian Defence Force Administrative Review Board (ADFARB)

11.62 In turning to the Australian military justice system, the committee found that the perceived lack of independence dominated the discussion on the administrative system. Concerns about partiality and bias emerged in the reporting stage of a complaint or report, carried through into the investigation phase and finally into the internal appeal or review processes. Without doubt reforms are needed to ensure that the independence of those investigating complaints or grievances is beyond question.

11.63 The committee understands that the establishment of the IGADF was intended to address this perception of independence. While the IGADF is a step in the right direction, the committee believes that it does not go far enough in establishing an independent review body for grievances. It is of the view that any further ad hoc change to the system will only exacerbate problems rather than ameliorate them and prolong the life of a system that is fundamentally flawed.

11.64 Having said that, the committee commends the initiatives being taken by the IGADF to establish a database of administrative inquiries, to improve the training of investigating officers and to develop a register of investigators. Even so, it is not confident that such measures are sufficiently strong to eradicate the perception of bias and to engender public trust in the system. The committee believes that the time has arrived for a restructure of the system and sees great merit in adopting the CFGB model.

---

49 *The First Independent Review by the Right Honourable Antonio Lamer P.C., C.C., C.D. of the provisions and operation of Bill C-25, An Act to amend the National Defence Act and to make consequential amendments to other acts, as required under section 96 of Statutes of Canada 1998, c.35,* September 2003, pp. 93–103.

11.65 In the committee's proposed structure, the chain of command retains the primary responsibility for resolving administrative complaints or grievances but a statutorily independent body established along the lines of the Canadian Forces Grievances Board will assume a strong presence as an appeals body. Mr Michael Griffin in his paper commissioned by the committee proposed the established of such a body to be named the Australian Defence Force Administrative Review Board (ADFARB). He explained:

> …it may be best to provide the opportunity for COs to manage these administrative problems initially and keep the first level of review within the unit for a reasonable period, the suggested 30 days, before it is referred to ADFARB. However, the volume of complaints received by the Committee about the handling of ROG at the unit level and the degree of damage caused thereby suggests that some external accountability is required. Therefore, it may be necessary to require notification to ADFARB within 5 working days of the lodgement of every ROG at unit level, with 30 day progress reports to be provided to and progress monitored by ADFARB.
>
> The program of training for investigators can be maintained within Defence with oversight by ADFARB and the panel of suitable investigators raised by the IGADF can be incorporated into this process (thereby preserving an asset for use on overseas operations as required). ADFARB can call upon such investigators as required or conduct its own investigations or formal hearings if necessary.[50]

11.66 The committee agrees with Mr Griffin's proposal.

Recommendation 29

11.67 The committee makes the following recommendations—

a) The committee recommends that:

- **the Government establish an Australian Defence Force Administrative Review Board (ADFARB);**
- **the ADFARB to have a statutory mandate to review military grievances and to submit its findings and recommendations to the CDF;**
- **the ADFARB to have a permanent full-time independent chairperson appointed by the Governor-General for a fixed term;**
- **the chairperson, a senior lawyer with proven administrative law/policy experience, to be the chief executive officer of the ADFARB and have supervision over and direction of its work and staff;**

---

50 Michael Griffin, Issues Paper, Senate Inquiry into the Effectiveness of the Military Justice System, para. 89–90.

- **all ROG and other complaints be referred to the ADFARB unless resolved at unit level or after 60 days from lodgement;**
- **the ADFARB be notified within five days of the lodgement of an ROG at unit level with 30 days progress reports to be provided to the ADFARB;**
- **the CDF be required to give a written response to ADFARB findings/recommendations;**
- **if the CDF does not act on a finding or recommendation of the ADFARB, he or she must include the reasons for not having done so in the decision respecting the disposition of the grievance or complaint;**
- **the ADFARB be required to make an annual report to Parliament.**

b) The committee recommends that this report

- **contain information that will allow effective scrutiny of the performance of the ADFARB;**
- **provide information on the nature of the complaints received, the timeliness of their adjudication, and their broader implications for the military justice system—the Defence Force Ombudsman's report for the years 2000–01 and 2001–02 provides a suitable model; and**
- **comment on the level and training of staff in the ADFARB and the adequacies of its budget and resources for effectively performing its functions.**

c) The committee recommends that in drafting legislation to establish the ADFARB, the Government give close attention to the Canadian National Defence Act and the rules of procedures governing the Canadian Forces Grievance Board with a view to using these instruments as a model for the ADFARB. In particular, the committee recommends that the conflict of interest rules of procedure be adopted. They would require:

- **a member of the board to immediately notify the Chairperson, orally or in writing, of any real or potential conflict of interest, including where the member, apart from any functions as a member, has or had any personal, financial or professional association with the grievor; and**
- **where the chairperson determines that the Board member has a real or potential conflict of interest, the Chairperson is to request the member to withdraw immediately from the proceedings, unless the parties agree to be heard by the member and the Chairperson permits the member to continue to participate in the proceedings because the conflict will not interfere with a fair hearing of the matter.**

d) The committee further recommends that to prevent delays in the grievance process, the ADF impose a deadline of 12 months on processing a redress of grievance from the date it is initially lodged until it is finally resolved by the proposed ADFARB. It is to provide reasons for any delays in its annual report.

e) The committee also recommends that the powers conferred on the ADFARB be similar to those conferred on the CFGB. In particular:

- **the power to summon and enforce the attendance of witnesses and compel them to give oral or written evidence on oath or affirmation and to produce any documents and things under their control that it considers necessary to the full investigation and consideration of matters before it; and**
- **although, in the interest of individual privacy, hearings are held in-camera, the chairperson to have the discretion to decide to hold public hearings, when it is deemed the public interest so requires.**

f) The committee recommends that the ADFARB take responsibility for and continue the work of the IGADF including:

- **improving the training of investigating officers;**
- **maintaining a register of investigating officers, and**
- **developing a database of administrative inquiries that registers and tracks grievances including the findings and recommendations of investigations.**

g) To address a number of problems identified in administrative inquiries at the unit level—notably conflict of interest and fear of reprisal for reporting a wrongdoing or giving evidence to an inquiry—the committee recommends that the ADFARB receive reports and complaints directly from ADF members where:

- **the investigating officer in the chain of command has a perceived or actual conflict of interest and has not withdrawn from the investigation;**
- **the person making the submission believes that they, or any other person, may be victimised, discriminated against or disadvantaged in some way if they make a report through the normal means; or**
- **the person has suffered or has been threatened with adverse action on account of his or her intention to make a report or complaint or for having made a report or complaint.**

h) The committee further recommends that an independent review into the performance of the ADFARB and the effectiveness of its role in the military justice system be undertaken within four years of its establishment.

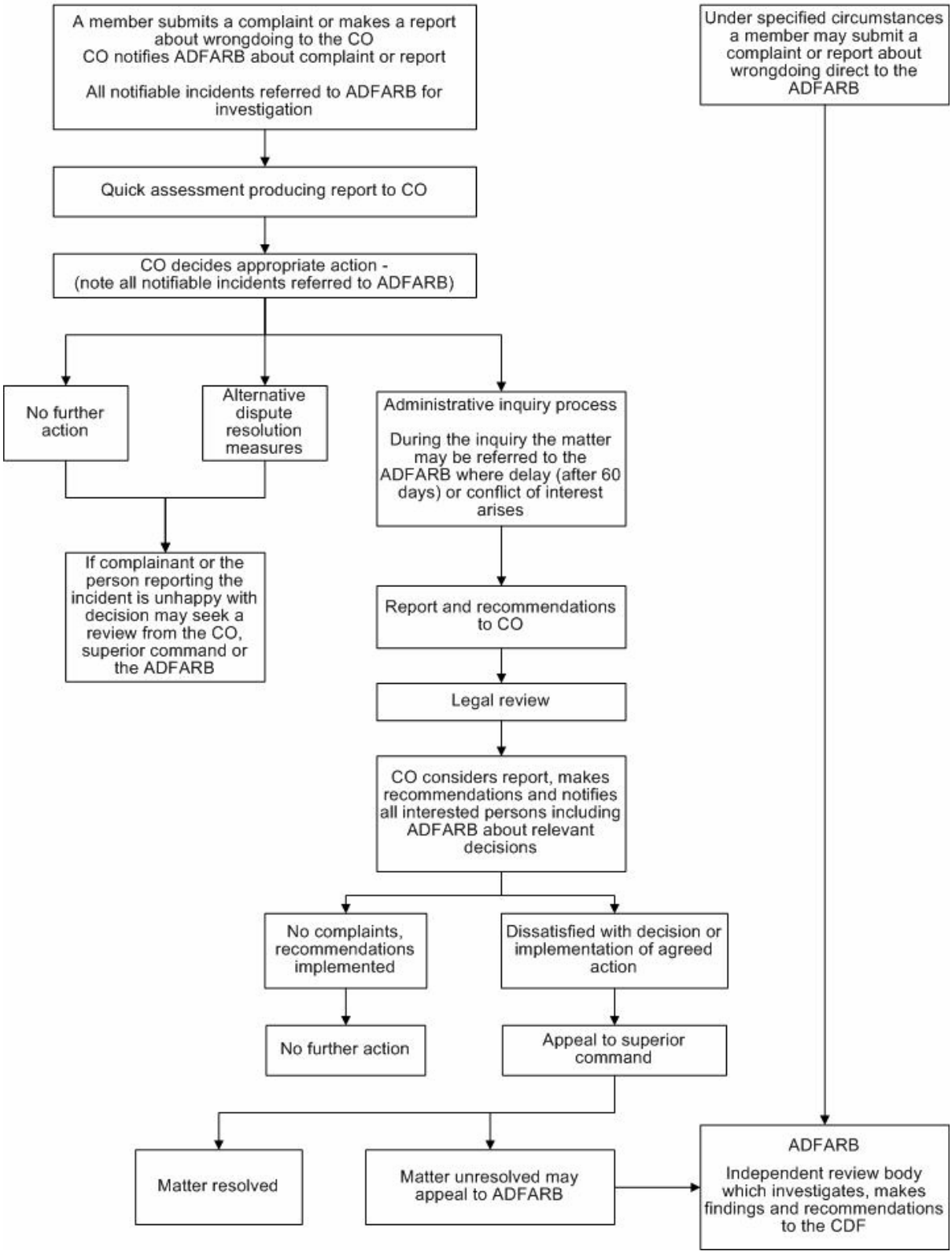
11.68 The committee understands that, at the moment, there are a number of complaints and ROGs that still remain unresolved years after being lodged. It believes that the ADF should take steps immediately deal with this backlog of grievances.

Recommendation 30

11.69 The committee recommends that the Government provide funds as a matter of urgency for the establishment of a task force to start work immediately on finalising grievances that have been outstanding for over 12 months.

11.70 The following chapter examines inquiries that are concerned with serious and complex matters requiring a higher level of investigation—the Board of Inquiry.

Making a complaint or reporting wrongdoing under the proposed new system where the ADFARB is the independent review body



Chapter 12

Boards of inquiry

12.1 The matters considered by a Board of Inquiry (BOI) are generally of a more serious or complex nature than those examined by Routine or Investigating Officer inquiries. They are most appropriate where an incident involves multiple deaths and injury of personnel, where there has been a death or serious injury involving complex matters, where there has been a serious or systemic breakdown of Service discipline or morale or where damage, loss or malfunction of a major Defence asset has occurred.[1]

12.2 The composition of, and procedures for, BOIs reflect their importance. Apart from the obligation to observe the rules and regulations set down for Routine and Investigating Officer inquiries, they must meet additional requirements and give greater attention to the principles of natural justice. For example, a BOI is conducted under the authority of Part III of the Defence Regulations and it:

- places stricter requirements on the appointment of the members of the Board—there must be at least two members one of whom must be an officer and one is to be appointed President;[2]
- gives greater recognition to providing legal assistance to BOI members and to members likely to be affected by the BOI—for example a person deemed likely to be affected by the inquiry including a deceased member is to be provided with legal representation;
- accords a more prominent role for legal practitioners in the proceedings notably the role and function of Counsel Assisting and the legal representatives of potentially affected persons (PAP);
- requires proceedings to be tape recorded and a full transcript of evidence to be prepared;
- strengthens the right to defend oneself by requiring PAPs to be given the opportunity to be present during hearings and by allowing their legal representatives to question witnesses;
- allows for evidence to be taken under oath or affirmation—where the appointing authority considers that a person may be affected by the inquiry;[3]

---

1 Australian Defence Forces Publication, Administrative Series, *Administrative Inquiries Manual,* Annex E to Chapter 2.

2 Regulation 26, Defence (Inquiry) Regulations 1985.

3 Regulation 31 (2).

- provides for public hearings as a matter of policy, particularly those involving major accidents which may attract strong and legitimate public interest—where the appointing authority has given such a direction; and
- imposes more stringent reporting obligations.

12.3 Consistent with other administrative inquiries, the purpose of a BOI is 'to determine the facts and circumstances surrounding an incident or situation so that an informed decision may be taken about the action required including, where appropriate, action to avoid a recurrence'.[4] The Defence Force Manual repeats in a number of places that a BOI is not empowered to make specific findings apportioning blame.[5]

12.4 The committee received evidence regarding a number of BOIs including the most recent inquiries into Army Exercise Big Wall, the loss of Leading Seaman Gurr, the death of Corporal Jason Sturgess, Exercise Everest 2001, and the accident aboard HMAS *Westralia*. This chapter examines the concerns raised in submissions about the BOI process. It looks first at a recent management audit of BOIs before considering matters raised in submissions.

Recent management audit of BOIs

12.5 Acumen Alliance, commissioned by the Defence Legal Service (TDLS), recently undertook a management audit of BOIs. It was to 'identify, assess and validate the practices and processes which facilitate efficient and effective BOIs'. Overall, it concluded that the BOI process is 'generally sound and serves the purpose for which it was created.' However, it also raised issues with regard to appointments of board members, the monitoring of, and guidance and support given to, BIOs.[6]

12.6 In summary, Acumen Alliance made a number of recommendations that TDLS instruct or provide further guidance on matters such as:

- alternative applications of the administrative inquiry options;
- the skills and experience appointees need to act efficiently and effectively;
- drafting and amending Terms of Reference;
- scoping and planning;
- PAPs and how they can appear and what type of appearance is advisable; and

---

4 Australian Defence Forces Publication, Administrative Series, *Administrative Inquiries Manual,* para. 7.3.

5 Australian Defence Forces Publication, Administrative Series, *Administrative Inquiries Manual,* para. 7.25.

6 Acumen Alliance, *The Defence Legal Service Board of Inquiry Management Audit,* October 20043, para. 1.3.

- reducing risk by selecting the appropriate Board format or combination of formats.

12.7 It also recommended that TDLS take certain action including:

- review the policy with regard to progress reports and monitoring;
- provide data in relation to any costs borne by them for each BOI to the appointing authority;
- examine alternative remuneration structures to determine more appropriate ways of recompensing Reserve Legal Officers;
- establish a process to manage and monitor Board performance; and
- develop a briefing program for appointing authorities and their staff and a second program for those appointed to the Inquiry to be given prior to any involvement with a BOI.

12.8 The above list of recommendations made by Acumen Alliance is not exhaustive but indicates the emphasis it placed on improving the education and training of personnel involved in a BOI and ensuring that TDLS takes an active part in monitoring particular aspects of a BOI. The committee agrees with the main thrust of these recommendations but draws attention to a number of matters raised in submissions to this inquiry that the audit did not address.

12.9 Even though a BOI offers greater assurances that an investigation will be thorough and well resourced, a number of witnesses believed that there were major flaws in the particular BOI in which they were involved. In the main, evidence presented to the committee concentrated on the same types of issues that were raised with regard to the Investigating Officer inquiry and the ROG. The committee notes that there is a clear pattern to concerns and defects in the ADF justice processes at all levels as raised with the committee.

12.10 The following section looks at the factors behind a decision to appoint a BOI and then examines particular aspects of the BOI processes including:

- procedural fairness;
- communication with those involved in the BOI;
- the independence and objectivity of the inquiry;
- the competence of the investigating officer and the role of experts; and
- the timeliness of the process.

Decision to conduct a BOI

12.11 Following a Quick Assessment, the appointing authority has the discretion to recommend the type of inquiry appropriate to the matters under consideration. In deciding to establish a BOI, an appointing authority will take account of the significance attached to the incident to be investigated.

12.12 Mrs Janice McNess, whose son was killed in an aircraft accident, was critical of the RAAF's failure to conduct a Board of Inquiry (BOI). She maintained that the decision was a major injustice in the investigation into the deaths of her son and his navigator, Mark Cairns-Cowan. In her view:

> Without it there could be no legal aspects to the inquiry, no sworn statements, no subpoenaed squadron members or witnesses and no opportunity for questions to be asked—only the more informal procedure of an accident investigation dependent on the goodwill of people to come forward with relevant information. This immediately downgraded the importance of the lost crew and took from them the chance for justice to be done and, importantly, to be seen to be done. In the years since the accident we have learnt from the families of other accident victims that boards of inquiry do not always provide the answers, but at least they do increase the chances of a fair outcome.[7]

12.13 She argued that as a consequence of not having a BOI:

> …we were left with unanswered questions, no possible redress and an unsatisfactory finding of 'probable loss of situational awareness', with too little emphasis on lack of currency, poor crewing, poor choice of exercise for a largely uncurrent Squadron, and too much emphasis on pilot fault—a point that remains unprovable.[8]

12.14 On the basis of the guidance now offered in the Administrative Inquiries Manual, and on a general appreciation of the serious nature of the incident, it would seem that Mrs McNess had strong grounds for her complaint. The accident, which occurred in 1993, involved the crash of an F-111C and claimed the lives of two serving personnel.

12.15 In 1998, the Defence Force Ombudsman found a case where one incident was investigated by a BOI while a very similar complaint was investigated by an investigating officer with significantly lesser powers. In her report, she suggested that this raised a question about the inconsistency in assessing how serious incidents should be treated. She suggested that the ADF consider whether the Defence instructions needed amendment by way of offering more specific guidance which might minimise the problem.[9]

12.16 The Defence Administrative Inquiries Manual now offers such guidance (see following table).

---

7 *Committee Hansard*, 28 April 2004, pp. 62–4.

8 *Submission P32*, p. 1.

9 Commonwealth Ombudsman, *Own motion investigation into how the Australian Defence Force responds to allegations of serious incidents and offences: Review of Practices and Procedures,* Report of the Commonwealth Defence Force Ombudsman pursuant to section 35A of the Ombudsman Act 1976, para. 2.56.

Table 7.1—Selecting the Most Appropriate Type of Inquiry

	ROUTINE INQUIRY	INVESTIGATING OFFICER	BOARD OF INQUIRY	GENERAL COURT OF INQUIRY
PHYSICAL FACTORS				
Number of witnesses	Small numbers	Best suited to small numbers	Any number	Any number
Commence inquiry	Very speedy	Speedy	Slower	Slow
Length of inquiry	Short	Relatively short	May be lengthy	May be lengthy
Complexity	Simple issues	Moderately complex	Complex issues	Complex issues
Ease of logistics	Easy	Relatively easy	More difficult	More difficult
Appointed by	CO	CO or higher	Delegated Appointment Authority	Minister
GRAVITY FACTORS				
Multiple deaths and injury of personnel	Not to be used	Not appropriate	Appropriate	Appropriate
Deaths or serious injury of personnel	Not to be used	May be used when facts are not complex, when member not on duty or when it arises from a Motor Vehicle Accident on duty but there are no suspicious circumstances	All other occasions	Appropriate
Sexual offences (*see* Paragraph 4.4)	No. *see* DI(G) PERS 35-3	No. *see* DI(G) PERS 35-3	No. *see* DI(G) PERS 35-3	No. *see* DI(G) PERS 35-3
Offences against the DFDA or civil criminal law	No, refer to Service police or civil police	No, refer to Service police or civil police	No, refer to Service police or civil police	No
Serious or systemic breakdown of Service discipline or morale	Not appropriate	Not appropriate	Appropriate	May be appropriate if most senior officer involved
Damage, loss or malfunction of major defence assets	Not appropriate	May be used when facts are not complex	Appropriate	May be appropriate
Where a damages claim against the Commonwealth is likely	Yes, if very minor and matter is simple	Yes	Major loss or damage only	Major loss or damage only
Loss or damage to defence property	Yes, if matter is simple	Yes	Major loss or damage only	Major loss or damage only
Motor vehicle accident not involving death or serious injury	Yes	Yes	Exceptional complexity only	Not appropriate
Redress of Grievance	Yes	Only where matter is serious and complex	Yes, where matter is very serious and extremely complex	No
Complaint of	Yes	Yes, if matter is serious	Yes, if matter is	No

	ROUTINE INQUIRY	INVESTIGATING OFFICER	BOARD OF INQUIRY	GENERAL COURT OF INQUIRY
harassment or discrimination		and complex	very serious and extremely complex	
Were there any international ramifications?	Not appropriate	Not appropriate	Yes, but it may have to be a Combined Board of Inquiry	No
Potential for media scrutiny	Yes, but only in unusual circumstances	Yes, but only in unusual circumstances	Yes	Yes
LEGAL AND OTHER FACTORS				
Can Australian Defence Force witnesses be compelled to attend to give evidence?	Yes	Yes	Yes	Yes
Can civilian witnesses by compelled to attend to give evidence?	No	No	Yes	Yes
Is evidence taken on oath or affirmation?	No	No	No, but may be if any person is likely to be affected by injury	Yes
Can witnesses claim the privilege against self-incrimination?	Yes	Yes	No	No
Can witnesses refuse to answer questions if they have a reasonable excuse?	Yes	Yes	Yes, but not on grounds of incrimination	Yes, but not on grounds of incrimination
Penalties specified in the Defence (Inquiry) Regulations can be applied to witnesses who refuse to appear or answer questions?	No	Yes	Yes	Yes
May affected persons be legally represented?	No (but they may seek legal advice prior to being interviewed)	No (**Note**: this is at the discretion of the Investigating Officer but is not usual).	Yes	Yes
Will a transcript be required?	No	No	Yes	Yes
Is the inquiry to be held in public?	No	No	Yes, as a matter of policy, unless otherwise directed by the Appointing Authority (inquiries involving major accidents normally should be open).	Yes
Is a report of the inquiry required?	Yes	Yes	Yes	Yes

Annex E to Chapter 2, Australian Defence Force Publication, Administration Series, *Administrative Inquiries Manual,* 15 May 2000.

12.17 A number of witnesses also expressed concern about the determination by the appointing authority on whether to hold a BOI. A witness, who lost a relative in an accident, was asked whether she would like an investigation rather than a BOI. She told the committee that:

> Basically, an investigation seemed to have a lot more advantages, so I agreed to go ahead with it, until I received an anonymous phone call a few weeks later and someone explained to me the whole process…I was so misinformed in a lot of areas. [10]

12.18 A BOI was held into this matter.

12.19 In his issues paper, Mr Michael Griffin referred to the policy applying to decisions regarding the selection of the type of investigation following an incident. He stated:

> Annex E to chapter 2 of the Manual indicates that a Court or Board of Inquiry (BOI) is appropriate for death and serious injury. It indicates that an investigating officer (IO) may be used in the case of a single death or serious injury 'when the facts are not complex, when the member is not on duty or when it arises from a Motor vehicle accident but there are no suspicious or unusual circumstances'. The annex notes that an IO is not appropriate for 'serious systemic breakdown of Service discipline or morale' but a BOI is.

12.20 He noted that despite this policy background, it was decided not to hold a BOI into the following recent serious incidents:

- major systemic problems involving brutality and harassment in at least two training schools,
- several suicides including the presence of disturbing ethnic undertones and systemic breakdown of morale,
- two cadet incidents involving female minors,
- major equity problems in a training unit,
- major drug problems in a unit, and
- major systemic morale and security problems.

12.21 He concluded that:

> These various incidents amounted to some twenty separate matters which Defence elected to inquire into by appointing an investigating officer rather than by holding a public BOI in which evidence would be given under oath in public and be available for testing under cross-examination. By contrast

10 Confidential *Committee Hansard*, 9 June 2004, p. 5.

> the evidence given to the investigating officers was not on oath and not given in public, nor was it tested by cross-examination.[11]

12.22 Clearly, the more rigorous procedures required of a BOI offer members and their relatives a greater sense of certainty that the inquiry will be an impartial and well resourced investigation and that the interests of any potentially affected person will be appropriately safeguarded. It is important that appointing authorities adhere closely to the stated policies governing the appointment of an administrative inquiry. In a number of cases this clearly has not happened. Again the problem does not appear to be with the guidance offered in the Defence Manuals but with the failure to observe it. The problem is with enforcing adherence to stated policy.

12.23 Despite the standing of a BOI, there is always the option to choose an inquiry with a higher status for incidents of even greater significance. Mr David Richards, a barrister and solicitor, was of the view that the BOI established to inquire into the accident on HMAS *Westralia* should have been elevated to a general court of inquiry. He stated:

> …a general board of inquiry would have been constituted to include a civilian Federal Court judge. The fact that there was a civilian judge presiding over a general board of inquiry would have given the public confidence. It would also have given members of the ADF and the families of the deceased, if you are talking about the Westralia, confidence that it was conducted independently. My submission continually talks about perceived independence. I am not suggesting that in many cases, even cases before this inquiry, there has not been independence, but perceived independence in a criminal justice system is as important as independence. To answer your question, a general inquiry would have had perceived independence.[12]

12.24 The committee agrees with his observation.

12.25 In its audit of BOIs, Acumen Alliance found that, while ADF policy gives commanders flexibility in selecting an administrative inquiry format or combination of formats suitable to the incident, commanders and legal officers do not appear to utilise this flexibility. It recommended that TDLS further instruct Commanders and legal officers in alternative applications of the administrative inquiry options. Instruction could entail a 'combination of training, briefing sessions and communication'.[13]

---

11 Michael Griffin, Issues Paper, Senate Inquiry into the Effectiveness of the Military Justice System, paras 73–75.

12 *Committee Hansard*, 9 June 2004, p. 40.

13 Acumen Alliance, *The Defence Legal Service, Board of Inquiry Management Audit,* October 2003, p. 7.

Committee view

12.26 The committee supports this recommendation. As noted above, however, the committee is more concerned with enforcing policy. It fears that while education may offer some improvement, it is not the complete answer. Again, it would appear that an independent body would have the objectivity and foresight to assess correctly the need to appoint a BOI or a General Court of Inquiry and make such a recommendation notwithstanding possible pressure from the relevant Service to down grade an inquiry to a lower level. This conclusion supports the recommendation for the establishment of the ADFARB as the appointing authority for serious incidents.

The effectiveness and fairness of BOIs

Procedural fairness

12.27 The Defence Inquiries Manual makes clear that certain procedures must be followed to ensure that the principles of procedural fairness are observed during a BOI. It advises that:

- where the President of a BOI considers that any evidence given before the Board may affect a person who was not present or represented before the Board when the evidence was given, the President *may* forward a copy of the relevant evidence to the person (emphasis added);[14]
- where the President has forwarded a copy of the relevant evidence to a person who may be affected by evidence, the President *should* inform the person that they have a right to apply to appear before the Board and to submit any written statement (emphasis added);[15]
- affected persons must be given the opportunity to be present during the Board hearings;[16]
- the Board cannot make adverse findings against a person who has not been given the opportunity to be heard;[17]
- a member who comes before the Board late in the proceedings may require an adjournment to familiarise themselves with all the evidence that has already been given;[18]
- the Board will be required, at the conclusion of the evidence to give notice to any individual against whom it is contemplated that adverse findings may be made.[19]

---

14 Australian Defence Force Publication, Administration Series, *Administrative Inquiries Manual,* para. 7.56. Emphasis added.

15 ibid., para. 7.56. Emphasis added.

16 ibid., para. 7.49.

17 ibid., para. 7.49.

18 ibid., para. 7.49.

12.28 Matters of procedural fairness were a significant issue in investigating officer inquiries and in the ROG process, and underlined the importance of having sure and definite procedures in place for all administrative inquiries.

12.29 As an added precaution to safeguard the interests of PAPs, the committee recommends that advice in the Inquiries Manual be reworded to convey certainty that affected persons will be afforded their rights.

Recommendation 31

12.30 The committee recommends that the language used in paragraphs 7.56 of the Defence (Inquiry) Manual be amended so that the action becomes mandatory.

12.31 The effect is that the President must forward a copy of the relevant evidence to a PAP and must inform that person that they have a right to apply to appear before the Board and to submit a written statement. This amendment would make the advice consistent with the prescriptive language used in paragraphs 7.49 and 7.52. It removes any uncertainty about the responsibilities of the appointing authority or the President and makes sure that anyone likely to be adversely affected by the inquiry is to be provided with the appropriate safeguards to protect their interests.

Recommendation 32

12.32 Similarly, the committee recommends that the wording of paragraph 7.49 be rephrased to reflect the requirement that a member who comes before the Board late in the proceedings will be allowed a reasonable opportunity to familiarise themselves with the evidence that has already been given.

12.33 One matter mentioned with regard to procedural fairness that attracted strong comment was the right to legal representation.

Right to legal representation

12.34 During the course of a BOI, evidence may be presented that reflects adversely on individuals. Procedural fairness dictates that people who are the subject of adverse comment should have the right to refute any such allegations. This does not appear to have been the case in the BOI into the fire aboard HMAS *Westralia*. A member who gave evidence to this BOI was only later to discover during the Coroner's inquest that Counsel assisting the BOI during his address behind closed doors had cast doubt on the conduct of this member and on the veracity of the member's evidence. The member told the committee:

> On discovering the BOI's view on my evidence, I cannot begin to tell you the negative effect this has had on myself and my family. After 21 years of devoted service and giving my all to the Navy, I'm now left feeling

19 ibid., para. 7.52.

> betrayed, humiliated and degraded, especially since I was not given the opportunity to defend myself.[20]

12.35 Given the serious nature of the matters under investigation by a BOI, natural justice would require that members likely to be affected by a BOI should have the right to legal representation. Judging by the comment by Air Commodore Harvey, the ADF's understanding, however, is that the representation of individual people is not an issue. He told the committee that at the time of engaging Acumen Alliance to conduct the audit:

> Our experience of recent boards of inquiry at that stage was that there was an extensive process to allow for people to be represented before boards of inquiry if they were affected people.[21]

12.36 Evidence before the committee counters this observation. The BOI inquiring into the *Westralia* incident gave rise to complaints that deceased members had no legal representation. Mr Pelly, whose daughter died aboard the ship, was concerned about the lack of due care and attention given to the needs of family members during a BOI. He was particularly concerned about the lack of representation for those who died in the accident. He told the committee:

> There was nobody there who bothered to defend the four dead seamen. There were statements made, and I still believe that some of them were derogatory; one, in particular, towards my daughter. In a normal legal sense, had there been somebody there to protect my daughter's interest, I am sure that that would have been fixed up at that board of inquiry. I believe that the Navy did not think it was in its best interest to defend her.[22]

12.37 He explained further:

> This [BOI] is the area where I began to fight, when I noticed the way that my daughter had been maligned at the board of inquiry. It was not done openly. To me, it was bloody underhanded. From the way I read the information in the board of inquiry, an observer would have got the impression that (a) my daughter had disobeyed a lawful command and gone into the engine room and (b) had panicked and contributed to her own demise. Both of those things were completely wrong. I had gut feelings about them because I knew my daughter and her character very well and it completely went against her character, so I started to investigate those things. It took me five years to finally get somebody to admit—and it was during the coroner's inquiry—that my daughter was ordered into the engine room.[23]

---

20 Confidential *Submission C11*.

21 *Committee Hansard*, 10 August 2004, p. 16.

22 *Committee Hansard*, 22 April 2004, p. 39.

23 ibid.

12.38 The coroner inquiring into the four deaths on board HMAS *Westralia* also observed:

> The families of the deceased were not represented before the Board of Inquiry and over an extended period of time they have raised concerns in relation to the circumstances surrounding the deaths. Initially it was the view of the families that an inquest was not the desired means of airing outstanding issues and that a public inquiry or Royal Commission would provide a more suitable forum.[24]

12.39 Defence regulations and the Defence Inquiries Manual now provide for the legal representation of deceased members. They advise that legal representation is provided to protect the interests and reputation of a member or deceased member during the inquiry.[25] The Manual states:

> As a matter of policy, a person deemed to be likely to be affected by the inquiry including a deceased member is to be provided with legal representation by a Service legal officer at Commonwealth expense.

12.40 According to the Manual, this arrangement should be authorised by the appointing authority prior to the commencement of the inquiry, or the President where the inquiry has commenced. This guidance is based on subregulation 33(3) of the Defence (Inquiry) Regulations. The wording of this regulation, however, does not necessarily convey the meaning that the right to legal representation for a deceased member is guaranteed but rather is conditional on the President authorising that person to appear.

12.41 The regulation reads:

> (1) Where the President of a Board of Inquiry considers that a person may be affected by the inquiry conducted by the Board, the President *may* authorize that person to appear before the Board.
>
> (2) Subject to subregulation (3), a person authorized to appear before a Board of Inquiry may appoint another person to represent the first-mentioned person for the purposes of the inquiry and the person appointed is authorized to appear before the Board.
>
> (3) A person authorized to appear before a Board of Inquiry shall not appoint a legal practitioner to represent that person for the purposes of the inquiry except with the approval of:
>
> a. where the inquiry has commenced—the President; or
>
> b. in any other case—the appointing authority (emphasis added).

---

24 *Record of Investigation into Death, Inquest into the deaths of Shaun Damian Smith, Phillip John Carroll; Megan Anne Pelly and Bradley Meek (HMAS Westralia),* Western Australia, p. 20.

25 Australian Defence Force Publication, Administrative Series, *Administrative Inquiries Manual,* para. 7.18.

12.42 Air Commodore Harvey indicated that Defence are in the process of amending regulation 33 to enshrine the right of representation.[26] During an Estimates hearing on 31 May 2005, the Senate Foreign Affairs, Defence and Trade legislation Committee asked about progress on the redrafting of the regulation. Air Commodore Harvey replied that he was not in a position to answer the question and would get back to the committee with a response.

12.43 To indicate its approval of the proposed amendment to regulation 33, the committee puts on the record a recommendation to that effect.

Recommendation 33

12.44 The committee recommends that the wording of Defence (Inquiry) Regulation 33 be amended to ensure that a person who may be affected by an inquiry conducted by a Board of Inquiry will be authorized to appear before the Board and will have the right to appoint a legal practitioner to represent them.

12.45 Further that a regulation be promulgated by the ADF that a person who has died as a result of an incident under investigation by a BOI will be entitled to legal representation.

Preconceived notions about a BOI

12.46 Much dissatisfaction with an inquiry can stem from notions that may take hold before an inquiry is even established and which in large part derive from the manner in which the initial incident was managed. Ms Joan Gurr's experiences with the Navy following the loss of her son Cameron, from HMAS *Darwin,* provides an example of the sensitivity required in such situations.

12.47 The Navy advised the committee that the Chief of Staff, Maritime Command, had maintained regular personal contact with Ms Gurr since the loss of her son. She was provided with every support. Indeed, Ms Gurr expressed to the committee her appreciation for the level of contact with the Navy, the assistance of the Defence Community Organisation and the fact that during the search for Cameron the Navy 'left nothing to chance'.[27]

12.48 Navy made arrangements for Ms Gurr and a close friend to travel to Christmas Island and then on to HMAS *Darwin* during the search for her son. This allowed her to meet her son’s shipmates and to be briefed personally on the conduct and scale of the search operation. She was also provided with updates of progress on the search operation and was notified about any media statements to be issued or

26 *Committee Hansard*, 10 August 2004, p. 12.

27 *Committee Hansard*, 21 April 2004, pp. 52–53.

interviews to be conducted.[28] Provision was also made for Ms Gurr to attend part of the BOI at Commonwealth expense.[29]

12.49 A Critical Incident Stress Management team consisting of a Navy psychologist and peer support member was sent to the ship while the search was still underway to work with Leading Seaman Gurr's shipmates. The team provided several group debriefings and sessions for individuals as required. The Critical Incident Stress Management team advised HMAS *Darwin* members at that time that they could obtain further follow-up support through the psychology section if they required it.[30]

12.50 The support and assistance offered to Ms Gurr following the disappearance of her son was in stark contrast to that experienced by the families of those who died in the fire in HMAS *Westralia.* Where Ms Gurr was very appreciative of the support she received from the Navy in terms of assistance from the DFO and the offer to attend the BOI hearings, the families of those who died in HMAS *Westralia* describe a very different experience. As noted previously in this report, one of the most important considerations for next of kin is to be kept informed of all developments in an investigation.

Communication and the provision of information

12.51 Some witnesses believed that the ADF's focus during BOIs can be too narrow: that it does not always appreciate that, while establishing the cause of an accident is important, family members have another set of more personal questions they need answered. The committee noted many examples where bereaved families simply wanted to know the circumstances surrounding the death of their loved one. For example, despite the care and attention given to Ms Gurr following the loss of her son, she was unhappy with the thrust of the inquiry. For her:

> …it is the personal issues that involved Cam. They are the answers that I needed. That is why I believe that, in my submission, I have been misunderstood as far as not being informed goes, because I needed to know the answers to the questions about the doona jacket. I need to know about the email that came from one of the other ships that was being queried. The personal things—I needed answers and I did not get them.[31]

---

28 ADF, *Submission P16*, p. 68.

29 *Committee Hansard*, 21 April 2004, p. 54. In addition, the Navy advised the Committee that the Chief of Staff telephoned her on the anniversary of Acting Leading Seaman Gurr's disappearance and over the following three days as her distress was very evident. He has also been in regular contact with her in relation to plans for a memorial to be erected on Christmas Island. He accompanied Ms Gurr to Christmas Island for the Gurr Memorial unveiling in Flying Fish Cove on 9 September 2003.

30 *Submission P16*, pp. 67–8.

31 *Committee Hansard*, 21 April 2004, p. 48.

12.52 The relative of a member killed in an accident informed the committee that she felt she had 'to continuously fight for information'. She explained that she was informed about the extent of injuries and cause of death by the funeral director on the way to the funeral. She stated:

> I feel pity and sorrow for other families who have had to endure a board of inquiry. I am sure that most would have had no military background or experience. The whole process would have been extremely daunting, not to mention being a strain while trying to deal with the grief of the loss of a loved one.[32]

12.53 The failure to involve families in the investigative process can also have serious, long-term administrative consequences for the ADF. Some witnesses interpreted the lack of information in a more sinister light. The JSCFADT's 1999 report into military justice procedures in the ADF noted this tendency. It observed:

> When relevant information is not forthcoming, it is understandable that next of kin perceive the process as a 'cover up', and an example of the ADF closing ranks to protect itself, or senior officers, from criticism.[33]

12.54 Evidence to this committee leads to the same conclusion. A number of submitters, who felt excluded from the inquiry processes into the accident on HMAS *Westralia*, consequently formed the view that there had been a white-wash to protect senior officers. Mr Kevin Herridge, who was a serving crew member in the *Westralia* at the time of the fire stated:

> I know that some witness and family members of the deceased felt intimidated by the fact that the BOI was a high profile Naval inquiry being held in a isolated Military establishment with little or no means for the general public to attend, therefore one could argue that the Navy or indeed Defence force for that matter was trying to keep it 'In House.'[34]

12.55 The father of a deceased crew member told the committee:

> ….a panel of five was hurriedly bought together to hold an inquiry into the events of the day. Three out of the five were naval personnel so the results they would come up with would show the Navy to be almost blameless.[35]

12.56 This distrust of the ADF resulted in some family members campaigning for an investigation to be reopened or to have other avenues of investigation taken up, such as the Coronial Inquest.[36] Indeed, in response to their dissatisfaction with the conduct

---

32 In camera *Committee Hansard*, 9 June 2004, p. 3.

33 Joint Standing Committee on Foreign Affairs Defence and Trade, Military Justice Procedures in the Australian Defence Force, 1999.

34 Kevin Herridge, *Submission P33*.

35 Victor Meek, *Submission P26*.

36 See for example, *Submissions P51, P3* and *P30*.

and outcome of the BOI, the families of those who died in the fire approached the WA coroner to hold an Inquest. The coroner reported on 19 December 2003.

12.57 The evidence indicating a lack of trust and confidence on the part of those who have experienced a military inquiry or investigation was of particular concern to the committee. Indeed, a dominant thread running through this report is concerned with the perceived and real lack of transparency and accountability in the way the ADF conducts an inquiry or investigation.

Conflicts of interest and the independence of the inquiry

12.58 A number of witnesses were troubled by the conflicts of interest that can emerge in routine and investigating officer inquiries. At times the relationships between the appointing authority, investigating officer and the complainant or the person subject of the inquiry clearly compromised the integrity of the process.

12.59 This type of potential conflict did not draw significant comment with regard to BOIs, though Mr Earley told the committee that:

> I have written to the relevant people about counsel assisting boards of inquiry not being drawn, wherever that is possible, from the commands that are appointing the board of inquiry—in other words, the command legal officer normally should not be the counsel assisting in a board of inquiry involving that command because his job is to advise the commander. [37]

12.60 The committee endorses this suggestion. Furthermore, it is of the view that a strict standard of impartiality must apply to all members of a BOI who should have no personal interest in the incident under investigation. The requirement to produce a written statement of independence should apply to Board members (see for example recommendations 28 and 29(c)).

12.61 The main criticism levelled at the independence and impartiality of BOIs was in the broader context where the reputation or public standing of the Service was at stake. For example, Mrs Yvonne Sturgess felt that the investigation into the death of her son, Corporal Jason Sturgess, in a motor vehicle accident had serious flaws, particularly the lack of consideration given to the state of the Armoured Personnel Carrier (APC). She was of the view that the ADF 'is incapable of objectively investigating itself' and stated her belief that the problem could be addressed by:

> …the ADF having non-combat related deaths investigated by an independent and adequately resourced and funded authority with the powers to allow it unrestricted access to records, facilities and personnel. Also normal operations such as maintenance of equipment and compliance with procedures should be open to regular audits and investigations by a

37 *Committee Hansard*, 5 August 2004, p. 99.

> suitably qualified and independent authority or company engaged by and reporting to parliament not the ADF.[38]

12.62 Mr Jonathan Ford, an uncle of Corporal Sturgess, was also of the view that ADF members operate under pressures that may cloud their objectivity and supported the proposal for an independent body to investigate such accidents. He stated:

> Because of the cultural reasons, even if you are professional enough to put it aside and think that nothing you have said will be taken in a blame culture and it will not affect your career, it has to have an underlying effect. Regardless of what the media might think, people—certainly our family—would have greater faith if there had been either a ministerial inquiry or supervision by a ministerial inquiry or the parliament itself. At least then there is an honest, objective appraisal of the whole accident. That is why we really welcome this inquiry.[39]

12.63 To Ms Gurr's way of thinking, the investigation into the loss of her son was intended to limit as much as possible any damage to Navy's reputation. She observed:

> As laymen it is difficult to grasp the legal complexities of such investigations and the frustration that people have, when it appears that nothing is resolved for the person or his/her family with the concentration of the investigation appearing to have more focus absolving the Defence Department of any blame.[40]

12.64 The highly publicised BOI into the fire aboard HMAS *Westralia*, drew criticism for its lack of objectivity. Mr Pelly in particular was forthright in expressing his views about bias in the BOI. He told the committee:

> When we [and Mr Brian Smith] received the BOI report on 17 December 1998, we both knew instinctively that something was wrong. The report was more interested in reducing damage and embarrassment for the Navy than in giving an accurate assessment of what happened on 5 May 1998.

12.65 He stated that the BOI was 'nothing more than a farce' and, in his opinion, 'was not run as an open investigation; it was run as a partially open attempt to reduce the impact of any embarrassment to the Navy'.[41]

12.66 In rejecting such views, Vice Admiral Chris Ritchie stated:

> It is my personal belief that the *Westralia* board of inquiry was an independent, public and open fact-finding process, particularly in light of the fact that there were two civilian experts on the board. Contrary to the unfounded allegations of some that the inquiry was an internal Navy whitewash, rigged to make predetermined findings, the board in fact judged

---

38 *Submission P14*, p. 5. See also *Committee Hansard*, 22 April 2004, p. 23.

39 *Committee Hansard*, 22 April 2004, p. 25.

40 *Submission P2*, p. 1. See also Mr Allen Warren, *Submission P5A*, p. 3.

41 *Committee Hansard*, 22 April 2004, p. 38.

> Navy's actions by objective civilian standards. It identified the problems and recommended reforms in a way that met Navy's immediate needs, as well as satisfying the external probity standards of the Western Australian coroner.[42]

12.67 Indeed, the committee notes that the coroner praised the work of the Board and its achievements in promptly identifying a wide range of important safety issues. In brief, the coroner found that the BOI report 'contained an excellent analysis of safety issues'.[43] While Navy's clear priority was to identify any systemic failures and prevent any recurrence of the problem, others involved in the inquiry had broader expectations of the process.

12.68 The coroner, in particular, reminded the Navy about the seriousness and extent of its duty of care obligations. He censured the Navy for its 'gross lack of supervision':

> In my view the navy has a responsibility for the safety of personnel working on its ships irrespective of any outsourcing arrangements.
>
> …
>
> The fact that no one in the navy had any knowledge of which type of hoses had been contracted for even after they were installed demonstrated a gross lack of supervision of the contract.
>
> …
>
> In my view if the navy is to demonstrate genuine commitment for the safety of its personnel it should ensure that there is some supervision of new parts being installed on its ships. The commonwealth was the purchaser of the hoses and could certainly have checked to ensure that it got what it paid for and that certification and safety issues were adequately addressed.
>
> …while there may be considerable benefits, including safety benefits, associated with outsourcing to competent and skilled organisations, particularly when the navy's competencies in specific fields of knowledge may be limited, that does not mean that there should be no navy supervision.[44]

12.69 Even though senior Navy officers quoted from the coroner's report to support the Board's findings and to uphold the integrity of the process, the coroner's words are a salutary reminder of the important role an independent authority can have in looking objectively at evidence surrounding an incident. The committee has already discussed

---

42 *Committee Hansard*, 1 March 2004, p. 18.

43 *Record of Investigation into Death, Inquest into the deaths of Shaun Damian Smith, Phillip John Carroll; Megan Anne Pelly and Bradley Meek (*HMAS *Westralia),* Western Australia*,* pp. 15 and 22.

44 *Record of Investigation into Death, Inquest into the deaths of Shaun Damian Smith, Phillip John Carroll; Megan Anne Pelly and Bradley Meek (*HMAS *Westralia),* Western Australia*,* pp. 114–115.

the blind spots that committed and dedicated ADF people can develop toward failings in the Forces. With clear vision, the coroner was well placed to identify, and speak freely about, shortcomings in the Service.

12.70 An independent inquiry into the loss of Leading Seaman Gurr may have removed the suspicion from the minds of some people that those responsible for the circumstances leading to the disappearance of the sailor had escaped blame. In this case, where excess drinking was found to have been a contributing factor, those charged over the incident were the sailors Gurr had been drinking with—not the senior officers duty bound to ensure the safety and well-being of those under their command. Ms Gurr told the committee:

> …I knew from the word go that any punishment that was dished out would be for the guys breaking the rules who were in the stern the night my son disappeared. That is fair enough, but, as I said, they were doing what they were doing because they were getting away with it and they knew they were going to get away with it. If we need to take a look at anybody we need to take a look up the chain, because somebody needs to make sure the rules are enforced on these younger people.[45]

12.71 The committee is left with the same view that the BIO into the death of Leading Seaman Gurr needed to address the larger question about the accountability of the higher echelons in the chain of command. Junior offices may flout the rules but superiors are ultimately responsible for the conduct of those under their command. In the committee's view, the responsibilities of those in the chain of command warranted the closest scrutiny by a detached and objective body.

12.72 The following observation by Ms Gurr sends a strong message about the possible limited value of a Service investigating itself:

> You can make rules and you can keep changing those rules, but you have to enforce them. You have to make sure they are enforced. My feeling is that, five months, 12 months or two years down the track, all the new rules will be in place and all the new signs will be put up, again nobody will be making sure that they are policed.[46]

12.73 It may be the case that an independent body able to focus on areas that the ADF may prefer to avoid is better placed to highlight or expose deficiencies in the Services. In this way, it may also be more effective in having a stronger and longer term influence on changing poor work practices. It certainly would speak with authority on matters such as the responsibility of senior officers to ensure that those under their command abide by the rules and behave appropriately.

12.74 Justice Roberts-Smith acknowledged that one of the problems of BOIs is the 'lack of perception of independence' but, at the same time, recognised the advantages

---

45 *Committee Hansard*, 21 April, 2004, p. 44.

46 *Committee Hansard*, 21 April 2004, p. 48.

in the inquiry 'being directed and scoped by officers of suitable military experience'. At first he suggested that 'were a properly independent military justiciary to be established, a DFM nominated by the JAG could be appointed to preside at a BOI'.[47] On reflection and after discussions with former Chief Justice Lamer, he was of the view that this course should be the exception. He made a clear distinction between administrative and judicial procedures, arguing that serving judicial officers should not be on a BOI.[48]

12.75 The committee cannot stress strongly enough the importance of having an investigating body above any suspicion of partiality. Evidence to this committee shows that the credibility of an inquiry comes under immediate challenge as soon as there is any hint of a lack of independence. This evidence supports the committee's recommendation for an independent authority to be responsible for the appointment of members to a BOI type of inquiry.

The competence and conduct of BOIs

12.76 The report has already considered and identified concerns with the level of competence of those conducting administrative inquiries. It has noted that the composition and procedures of a BOI reflect its importance and that higher standards are expected of board members. The following section looks at the gathering, presentation and testing of evidence.

12.77 The BOI into the accident on HMAS *Westralia* drew heavy criticism for the way the investigation was conducted. The committee is not in a position to re-examine the evidence presented at the hearings. It can nevertheless draw attention to areas of concern.

12.78 One ADF member questioned the quality of the basic investigative procedures such as those taken to secure the accident scene on board the *Westralia*.[49] The competence and judgement of the initial investigating team also came under question for the manner in which it obtained witness statements. Indeed, the initial investigation of the site of an accident or incident has been identified by other witnesses as a major concern for inquiries concerned with suicides. One member contended that the ADF does not possess the expertise or experience for engaging in this type of forensic inquiry and suggested that 'Defence Force personnel should be trained in the correct procedures for handling and preserving crime scenes…'[50] This matter about the competence of investigations was discussed in chapters 8 and 9. The *Westralia* experience supports the committee's recommendation that, in terms of

47 *Submission P27*, p. 7.

48 *Committee Hansard*, 21 June 2004, pp. 42–3.

49 *Submission P33*.

50 *Submission P33*.

forensic evidence, preliminary investigations into sudden deaths and serious accidents should be in the hands of the relevant police force or the AFP.

12.79 The committee now turns to the hearing process of a BOI to consider whether the level of experience and training of board members is equal to the difficult task of conducting such inquiries. It also looks at whether their performances meet public expectations.

12.80 Both families of the deceased and witnesses in the *Westralia* BOI felt aggrieved by many aspects of the conduct of the inquiry. The committee has already mentioned complaints about the failure to provide legal representation, difficulties in obtaining relevant information and the apparent lack of independence of the investigators. For Mr Lyndon Pelly, whose daughter died in the *Westralia* fire, the inquiry also lacked thoroughness:

> Post BOI and during the coroner's inquest, new evidence was revealed and inspections and testing of this evidence was carried out.
>
> One such piece of evidence was a high pressure fuel line with a hole in it, found to be loose and removed from the engine after the BOI, then kept hidden in a cabin on the ship.
>
> From there, this possibly important piece of evidence was handed over to a contractor (ADI) and kept under lock and key for four years. Numerous attempts were made by the families' legal representatives to locate this piece of evidence through the navy without success.
>
> This evidence was finally given up only after the holder (ADI) was challenged by Mr Collaery during the Coroner's inquiry to produce it.[51]

12.81 A crew member, who was in the engine room at the time of the fire, also felt that important evidence had been discounted. The BOI had requested that he read from a notepad in which he had written, at the time of the fire, the names of those still in the engine room. The crew member told the committee that he was not required to tender the notepad as evidence but that counsel assisting the BOI, in his closing submission, suggested that the notepad was 'supposedly never found or tendered as evidence'.[52]

12.82 Whatever the reason behind the confusion about the status of the notepad, the crew member saw it in light of Navy's attempt to protect its image. He told the committee:

> It was possible that list, made within seconds of the fireball going up, contained the names of four people which would later be found dead…whereas it had already been widely reported in the Australian media

---

51 Lyndon Pelly, *Submission P30*.

52 In camera *Committee Hansard*, 22 April 2004, p. 43.

> that the captain had ordered the engine room to be sealed and the CO_2 drench to be discharged.[53]

12.83 His interpretation again reinforces the notion that the BOI into the accident on the *Westralia* was compromised by its lack of independence.

12.84 In returning to the matter of the competence of board members, a relative of a member killed in an accident that had been investigated by a BOI, believed that such boards were appropriate but that appointed members should be better trained in how to conduct such inquiries.[54]

12.85 It should be noted that the Defence Force Manual recommends that the appointing authority should appoint a Service legal officer, to be known as 'the Counsel assisting the inquiry', to assist the BOI. Counsel assists the Board 'by identifying the issues, questioning and presenting the evidence, advising on questions of law and procedure, which will enable the Board to concentrate on considering and weighing the evidence presented to the inquiry'.[55]

12.86 Even so, senior ADF members informed the committee that they were aware of the importance of having adequately trained investigators and that measures are in place to improve training, including for members of BOIs. Air Commodore Harvey told the committee:

> The training that is provided to people who are non-legal officers is probably better addressed by other people, but I do know from experience and can tell the committee that there is extensive training provided as part of the promotion courses and initial training courses and, more importantly, in relation to pre-command courses. We have invested a fair bit of time in recent years and months in developing and improving the training that is provided to commanding officers—and, in the case of Navy, executive officers—before they take over their command. These courses have components which consist of presentations by members of my administrative law staff, who go through and provide them with details about how to conduct inquiries and about administrative action in general. Although it is not formalised, there is a standing practice that anyone who is appointed to a board or as an investigating officer is able to, and regularly does, seek advice from legal officers. I think one of the recommendations from the Acumen Alliance review is that this process be formalised. We have accepted that recommendation and we are working towards implementing it.[56]

---

53 ibid.

54 In camera *Committee Hansard*, 9 June 2004, p. 5.

55 Australian Defence Forces Publication, Administrative Series, *Administrative Inquiries Manual,* para. 7.8.

56 *Committee Hansard*, 10 August 2004, pp. 1–2.

12.87 Clearly, for the ADF, the training of investigators and board members is a high priority and one that it takes seriously. The committee, however, is not convinced that extra courses and the provision of legal advice will suffice. In light of the failings of previous undertakings to improve the training of investigators, the committee has already expressed its strong doubts about the likely success of the new initiatives (see paras 8.86–8.94). To provide greater certainty that BOI members have the appropriate skills and experience necessary to conduct a proper inquiry and have the standing to engender confidence in the proceedings, the committee believes that new arrangements must be introduced for the selection and appointment of such members.

Access to expert advice

12.88 While the evidence before this committee raised certain concerns about the professionalism and training of investigating officers, a particular emphasis with BOIs was on the importance of having expert advice available. A BOI is intended to investigate serious or complex matters and is expected to have the necessary resources and expertise available to inquire into and consider the matters under investigation.

12.89 Considering the significance and complexity of the matters under investigation, expert assistance may be helpful at the early stage of drafting the terms of reference. One witness involved in a number of BOIs told the committee:

> As a climber and trekker of 29 years experience, it was apparent to me that by utilising a Subject Matter Expert (SME) during the conduct of a Quick Assessment would have significantly assisted Counsel in identifying key issues and developed a focussed TOR. The British Army, which runs a significantly larger Overseas Adventurous Training program than Australia, deploys a Legal Officer and SME to the incident site of an accident to conduct the Quick Assessment, a practice borne out of previous experience with BOI.[57]

12.90 He recommended that a subject matter expert be brought in to assist with the conduct of a Quick Assessment.[58] The committee endorses the view that Appointing Authorities must consider calling in relevant independent experts to assist in drafting terms of reference.

12.91 Some people with experiences of a BOI certainly appreciated the value of having relevant experts available to advise the Board during the inquiry. The type of expertise, however, extends beyond legal practice. One witness suggested that, where inquiries investigate matters that are not familiar to Board members and counsel, a subject matter expert needs to be engaged in order to assist the inquiry process.[59] He told the committee:

---

57 Confidential *Submission C5*, p. 2.

58 Confidential *Submission C5*, p. 2.

59 Confidential *Submission*, *C5*, p. 3.

> Often, practices in technical areas can be counter-intuitive to the layman. There is a risk that the layman's perceptions may lead into areas of inquiry that ultimately may be fruitless and wasteful of time and effort. This is particularly so in trekking and mountaineering at high-altitude and Big Wall climbing. These activities are foreign to most Australians whose opinion may be shaped by sensationalist and shallow media reporting as well as popular culture.
>
> …
>
> SMEs can also 'educate' the Board on technical matters to assist with their understanding of relevant issues.[60]

12.92 He recommended that 'for inquiries into issues and activities of a technical nature that is unfamiliar to the Board, an SME should be engaged to assist and advise the Board.'[61]

12.93 The committee notes that despite the criticism levelled against the BOI into the fire on HMAS *Westralia*, the coroner concluded that the report contained 'an excellent analysis of safety issues'.[62] The committee acknowledges that the ADF is aware of the advantages in having relevant experts on a BOI. Lieutenant General Leahy stated:

> In the administrative sense, there have been examples where we have sought the assistance of very highly qualified people, and I am thinking now of the Royal Australian Air Force reseal and deseal incident, where the president of the board was a civilian reservist lawyer who brought his particular skills to that board. I know of other examples from other courts of inquiry where we sought the assistance of independent authorities—people with particular skills. In inquiries that Army has conducted…we do not just pop out a recommendation and accept it; they are then considered in detail. For the case of the SAS soldier, they were considered in detail by eminent reservists, both as QC, SC, as practising Crown prosecutors and others. I think that brings a sense of impartiality, transparency and objectivity.[63]

12.94 The committee recognises the importance of having independent experts to assist an inquiry and believes that it would be remiss of any appointing authority to fail to acknowledge the need to provide for relevant expert assistance. It endorses the recommendation that an SME be engaged to assist and advise Board members for inquiries into matters of a technical nature unfamiliar to the Board.

---

60 ibid.

61 ibid.

62 *Record of Investigation into Death, Inquest into the deaths of Shaun Damian Smith, Phillip John Carroll; Megan Anne Pelly and Bradley Meek (*HMAS *Westralia),* Western Australia, p. 15.

63 *Committee Hansard*, 5 August 2004, pp. 8–10.

Delays

12.95 The ADF has procedures in place to minimise delays during a BOI. Before completing the terms of reference for a BOI, the appointing authority is to ensure that the scope of an inquiry is determined, that the terms of reference are appropriate and a time line is set.[64] This exercise should indicate the anticipated schedule for the inquiry and the resources required to conduct it.

12.96 To prevent unnecessary or unexpected delays during the course of a BOI, the Defence Force Manual states that the appointing authority is to monitor the progress of the BOI. This is to ensure that the BOI is not distracted by issues beyond the terms of reference or by taking evidence in connection with matters not strictly relevant to the inquiry.[65] It directs that:

> The Board of Inquiry may inquire into any matter relevant to the Terms of Reference and may visit any place necessary for the conduct of the inquiry. If a line of inquiry is not relevant to the Terms of Reference, then there is no power to pursue it. The inquiry must remain focused on the terms of reference that have been authorised by the Appointing Authority.[66]

12.97 Furthermore, the President is responsible for ensuring that lines of questioning are relevant to the Terms of Reference and it is his or her duty to identify issues that are strictly relevant to the inquiry which are to be pursued to resolution.[67]

12.98 The ADF recognises that protracted BOIs are a major problem and some senior officers openly expressed their concern about the time taken to complete BOIs.[68] Colonel Ian Westwood, Chief Judge Advocate, identified one of the major difficulties in exercising judgment and discipline when conducting a BOI:

> The judgment as to how far an inquiry should legitimately go is very much harder when you are dealing with administrative matters and looking at not just whether an event occurred, to a requisite standard of proof, but why it occurred. You will appreciate that that inquiry is rather like throwing a stone into a pond. The ripples will go out to the edge of the pond and they will then proceed up the various tributaries that feed it. At some point a judgment has to be exercised as to where you stop, but it is a very difficult judgment to exercise.[69]

---

64 Australian Defence Forces Publication, Administrative Series, *Administrative Inquiries Manual,* para. 7.10.

65 Australian Defence Forces Publication, Administrative Series, *Administrative Inquiries Manual,* para. 7.19.

66 ibid., para. 7.27.

67 ibid., para. 7.28.

68 See for example, Air Commodore Harvey, *Committee Hansard*, 10 August 2004, p. 9.

69 *Committee Hansard*, 10 August 2004, p. 11.

12.99 The BOIs into the two climbing accidents are clear examples of where unnecessary delays occurred. One witness involved in the inquiries observed that the 'stop-start' nature of the inquiries was 'totally unsatisfactory from the perspective of a PAP'.[70] He explained further:

> Individuals who are potentially identified for adverse comment suffer a significant amount of stress, irrespective of whether they are faultless or there is blame or criticism made. The prolonged nature of the Inquiry process isolates individuals who have no moral or psychological support for a process that can take years.[71]

12.100 His views had the support of four other PAPs. He goes on to state that the period of uncertainty and lack of support continues long after the BOI concludes. Report writing, legal review, appointing authority deliberation, administrative action, redress of grievance procedure can add to the delay which means that the process may close years after the initial inquiry. For example the Everest BOI Report was released in May 2003, two years after the accident.

12.101 Another witness told the committee that the length of time that the BOI took has to be considered. She told the committee that there was a lot of confusion with the BOI in which she was involved:

> …due to the fact that it stopped and started. Certain personnel were removed from the original panel and were replaced. There were rumours going around about cover-ups for certain personnel who were selected for the board. All this is yet to be investigated…[72]

12.102 At the other extreme, the BOI into the fire on HMAS *Westralia*, has drawn strong criticism for being held too quickly. It was convened soon after the accident occurred. A number of people attributed the haste in conducting the BOI to Navy's desire to demonstrate decisiveness. One member observed that the 'quick formation of the BOI was to show that the Navy or Defence did not want to be seen as "dragging its feet"'.[73] This statement also reflects the pressures exerted by the potential conflicts of interest created when a Service investigates itself.

12.103 It should be noted that there will be rumour and innuendo surrounding a major incident but effective, transparent and inclusive processes would limit the opportunities for such speculation to gain ground.

12.104 The BOI into the *Westralia* was convened at HMAS *Stirling* and began hearings within a few days of the fire. A number of submitters construed the quick convening of the BOI at a location that was difficult for the public to access as an

---

70 Confidential *Submission C5,* p. 4; Potentially affected person (PAP).

71 Confidential *Submission C5,* p. 4.

72 In camera *Committee Hansard*, 9 June 2004, p. 12.

73 *Submission P33*, p. 1.

attempt by Navy to protect its interests and those of senior Navy personnel. The taking of statements from those involved in the fire at the same time the funerals for the deceased were occurring further reinforced this perception. Mr Kevin Herridge, a serving a crew member in the *Westralia* at the time of the fire, told the committee:

> ….it [the BOI] may have been a little premature given the fact that the funerals hadn't taken place and that the families and potential witnesses were still suffering from grief and shock. We can all appreciate the need to get the evidence whilst it is still fresh in people's minds but some people just wouldn't have been up to it.
>
> Three days later, the day of the memorial service I was required to give my statement, this happened shortly after the service had finished and everyone was paying their respects to families and alike while I was detailed off to the administration building to formally give my statement to the lawyers. The timing of this was as you can imagine not the best. I was still suffering from shock and disbelief that this accident had actually happened and I was understandably still confused, in a state of distress trying to come to grips with the death of personnel in my charge. The interview lasted about six hours or so and was very disturbing.
>
> Looking back now at the time of giving my statement I was probably not fit to do so. It wasn't until several days later when things started to sink in and become clearer that I started to remember more things that should have been included in my statement, this meant that I had to amend my original statement to correct the sequence of events.[74]

12.105 The coroner found that the hearings were too close to the events for there 'to have been any realistic expectation that the families could have had sufficient composure to be able to approach the relevant issues in a reasonably analytical manner so as to be able to identify the issues of importance to them'.[75] He was of the view that some witnesses would still have been struggling with the shock of the horrific accident and grief at the loss of life which may have caused them to block out certain events from their memories. He concluded:

> While I have great respect for the work of the Board of Inquiry and its achievements in promptly identifying a wide range of important safety issues, the Board of Inquiry was not ideally placed to determine issues of credibility in this context.[76]

12.106 Vice Admiral Ritchie stated, however:

---

74 Kevin Herridge, *Submission P33*.

75 *Record of Investigation into Death, Inquest into the deaths of Shaun Damian Smith, Phillip John Carroll; Megan Anne Pelly and Bradley Meek (HMAS Westralia),* Western Australia, pp. 23–4.

76 *Record of Investigation into Death, Inquest into the deaths of Shaun Damian Smith, Phillip John Carroll; Megan Anne Pelly and Bradley Meek (HMAS Westralia),* Western Australia, p. 22.

> Whilst I appreciate the families' concerns, and I certainly share their grief, Navy's duty at the time was to identify the causes as quickly as possible and to prevent recurrence. I was reassured of the soundness of that inquiry process by the coroner's endorsements of our safety analysis.[77]

12.107 In establishing the BOI, the need to make the ship safe and to prevent any further accidents as well as to meet the broader political concerns of the Navy and the Australian public dominated Navy's concerns. With the benefit of hindsight, the committee suggests that Navy may have lost sight of those closely involved in the fire and probably the ones most in need of its attention. Clearly, there are lessons to be learned about the need to balance the immediate safety and political concerns of the day with the duty of care to those affected by the accident. It is the committee's view that persons removed from these immediate pressures would be better placed to take a more sober and thoroughly considered approach to the initial investigation, the appointment of a BOI and the drawing up of the initial terms of reference.

12.108 In addressing the more specific problem of delays, the committee notes the importance that an independent oversight body would have in monitoring the progress of an inquiry and ensuring that, in consultation with Board members, reasonable progress is made.

Reprisals or interference with witnesses

12.109 The committee heard evidence suggesting that some members feared reprisals for reporting wrongdoing and for giving evidence before investigating officer inquiries. This type of behaviour was not mentioned with regard to BOIs. Yet, some witnesses involved in the BOI into the accident on the *Westralia* questioned the advice they received before giving evidence before the board. Ms Munday, who was on board the *Westralia* at the time of the fire, felt that she had come under influence to suppress the truth. She told the committee:

> In May last year I made a statement to the coroner of Western Australia, who was holding a coronial inquest into the four deaths on HMAS *Westralia*. I gave evidence that we were pressured by naval hierarchy to mislead the board of inquiry. From the statements made by one of the senior personnel, we were told that, if the civilian lawyers—the contractors—asked us that if we had worked on fuel systems on HMAS *Westralia* we should say no, because we were not qualified to do so, which was not correct. Also we were told that if we were asked whether we used certain tools, such as shifting spanners, on any systems, we should say no that we had not used those either, which was incorrect. [78]

12.110 The coroner, however, found her evidence 'vague and unspecific'. He concluded:

---

77 *Committee Hansard*, 1 March 2004, pp. 17–18.

78 *Committee Hansard*, 21 April 2004, p. 21.

> There is no evidence in the accounts of Lieutenant Commander Crouch, Warrant Officer Bottomley or any of the other navy personnel who were called at the inquest which would support the suggestion that any pressure was applied to witnesses in relation to the evidence which they [Ms Munday and Ms Justice] gave at the Board of Inquiry.[79]

12.111 The coroner could find no grounds for suspecting that witnesses were pressured or influenced with regard to the evidence they were to give before the Board. Ms Munday's interpretation of what occurred, however, is a timely reminder to all ADF personnel of the care that needs to be taken when giving advice either formally or informally to potential witnesses.

Conclusion

12.112 BOIs inquire into serious and complex matters, often where the death of an ADF member is involved. In some cases they involve highly technical matters and may have severe political implications. Public expectations of a BOI are generally high and the next of kin look to the board to answer questions that sometimes cannot be answered. The demands placed on a BOI are heavy.

12.113 The committee notes that a recent audit of BOIs by Acumen Alliance made a number of recommendations to improve the system. While agreeing that they are sensible and designed to improve the inquiry process, the committee believes that they do not address the central issue—the potential for perceptions of a lack of independence which can have the effect of undermining the integrity of proceedings.

12.114 Mr Michael Griffin, in an issues paper prepared for the committee, put forward a proposal that addresses, in particular, this independence aspect of investigations and inquiries into major accidents. He suggested that the responsibility for the investigation of such incidents be conferred on the proposed statutorily independent ADFARB. He noted that his proposal covers matters that would typically be the notifiable incidents which all ADF units are currently required to report to higher command, such as death, serious injury, loss of major equipment and matters likely to attract media interest, whether they occur inside or outside of Australia. He explained further:

> The chairperson of the ADFARB would be empowered to decide on the manner and means of inquiring into the cause of such incidents. The legal aspects of the relationship with the State and Territory civil authorities could be settled by overriding Commonwealth legislation or by the putative Memorandum of Understanding (MOU) with the States/Territory Coroners.
>
> The ADFARB legislation would include matters which the chairperson would take into consideration in determining the manner of inquiry. This might involve consultation with the relevant Ministers, State and Federal,

---

79 *Record of Investigation into Death, Inquest into the deaths of Shaun Damian Smith, Phillip John Carroll; Megan Anne Pelly and Bradley Meek (HMAS Westralia),* Western Australia, p. 106.

the CDF and Service Chiefs, various civilian authorities and the families and next of kin of ADF members involved. The Minister of Defence would retain absolute authority to appoint a Court of Inquiry…should he deem such to be necessary. The chairperson would determine the appropriate vehicle for the inquiry and, subject to security considerations, publish written reasons for the choice of inquiry vehicle.

If satisfied that an investigation would suffice, the chairperson could select a suitably qualified person from the panel of investigators or from the civilian community. CDF would have the right to nominate a suitably qualified military officer to assist the investigator. The investigator could also come from or be assisted by the ADFARB staff from the ROG area with relevant expertise and experience.

If the chairperson decided that a more formal inquiry process was required, akin to the present Boards of Inquiry, then the chairperson could refer the matter to a military division of the Administrative Appeals Tribunal (AAT). The AAT is a Federal merits review tribunal which has a President who is a Federal Court Judge, several Presidential members who are Federal or Family Court judges, Deputy Presidential members both full and part time who are very senior lawyers and a large number of full and part time members who include several retired senior military officers of one and two star rank.

The AAT has very considerable administrative law expertise and regularly deals with Defence related matters in Veterans Affairs, Military Compensation Scheme, Comcare and Security issues, in its various divisions. It has offices and conducts public hearings in all major cities and can utilise Commonwealth facilities in other places. Its large number of experienced administrative review members are appointed by the Governor-General on fixed terms of appointment. There are sufficient part time members to cope with any surge capacity required for occasional military inquiries.

The cost effect of utilising this existing Federal agency and its state of the art infrastructure would be minimal in contrast to establishing a new agency or continuing with ad hoc BOI. The reputation of the AAT is impeccable and this would be of great importance for perceptions of independence. The members allocated to the military inquiry would be chosen by the AAT President in consultation with the ADFARB chairperson. CDF would have the right to nominate a suitably qualified military officer to sit as a member of the inquiry tribunal. The ADFARB chairperson would appoint the counsel assisting the inquiry from his standing panel of counsel or from the civilian bar. Potentially affected ADF personnel (PAP) would continue to have legal representation at Commonwealth expense, the counsel representing being nominated by the Chief of Defence Trial Counsel.

The AAT has the existing skills, resources, experience and independence to provide an efficient and effective external inquiry process for Defence matters at no additional cost and it could be established in this role almost immediately.

12.115 The results and findings of any AAT inquiry or other investigation undertaken by reference from the ADFARB would be provided to the chairperson, the CDF and any PAPs. Certain restrictions, based on national security or public interest grounds, as set down in the Act may apply to the release of particular parts of a report to PAPs. Based on the findings of the AAT inquiry, the chairperson would then determine the further disposition of the matter and provide CDF and the minister with his or her findings and recommendations. CDF would be required to provide written reasons for declining to accept any recommendations made by ADFARB. The chairperson would publish an annual report of all matters dealt with by ADFARB, including matters referred to CDF and responses to them.[80]

Committee view

12.116 The committee understands that the proposal to create a military division of the AAT to undertake investigations into serious incidents in the ADF widens the jurisdiction of the AAT. It is a body that reviews, on the merits, a broad range of administrative decisions made by the Australian Government. Since its establishment in the mid 1970s, the AAT's areas of jurisdiction have grown and now include social security, veterans' entitlements, Commonwealth employees' compensation, taxation, migration, freedom of information, corporations, insurance, securities regulation and compensation for land acquisition'. The divisional structures of the Tribunal have been adjusted to accommodate these changes.[81] The committee envisages the proposed military division of the AAT as a further extension of the AAT's jurisdiction. As noted by Michael Griffin, the new division would draw on the Tribunal's 'existing skills, resources, experience and independence to provide an efficient and effective external inquiry process for Defence matters'.

12.117 The committee considers that the AAT is well placed to assume the responsibility for undertaking inquiries into incidents in the ADF involving serious and complex matters for the following reasons:

- the AAT is an independent body that reviews a broad range of administrative decisions—members are appointed by the Governor-General for a fixed term;
- the AAT is not a court and cannot exercise judicial power—consistent with the principles underpinning administration inquiries in the military justice system, a board, constituted under the military division of the AAT, would

---

80 Michael Griffin, Issues Paper, Senate Inquiry into the Effectiveness of the Military Justice System, paras 91–98.

81 The Hon Justice Garry Downes, President of the Administrative Appeals Tribunal, 'Tribunals in Australia: their Roles and Responsibilities', in the Law Reform Commission's journal, *Reform*, Autumn 2004, and also Administrative Review Council, *Overview of the Commonwealth System of Administrative Review,* http://www.law.gov.au/agd/www/archome.nsf/AllDocs/7C8BE4EE5BE614C8CA256C… (3 June 2005).

present its findings and make recommendations but would not determine guilt or innocence or impose a penalty;

- AAT decisions are based in findings on material questions of fact—when giving reasons for its decision the Tribunal shall 'include its findings on material questions of fact and a reference to the evidence or other material on which those findings were based'.[82]

- the AAT's procedures allow for flexibility, for example the Tribunal 'is not bound by the rules of evidence and can inform itself in any manner it considers appropriate'[83]—the absence of formality and the technical requirements of the rules, however, do 'not displace due process, natural justice or procedural fairness';[84]

- the AAT prefers to conduct open hearings[85] but has the authority, where it is satisfied that for confidentiality reasons restrictions should operate, to direct, inter alia, that a hearing or part of a hearing shall take place in private or give directions prohibiting or restricting the publication of evidence given before the Tribunal;[86]

- AAT members have expertise in areas such as 'accountancy, actuarial work, administration, aviation, engineering, environment, insurance, law, medicine, military affairs, social welfare, taxation and valuation' and members are assigned to the relevant Division according to their area of expertise.[87]

---

82 Section 43, *Administrative Appeals Tribunal Act 1975.*

83 Administrative Appeals Tribunal, *Introduction to the AAT,* AAT website, http:www.aat.gov.au/AboutTheAAT/Introduction ToTheAAT.htm (3 June 2005).

84 The Hon Justice Garry Downes, President of the Administrative Appeals Tribunal, 'Tribunals in Australia: their Roles and Responsibilities', in the Law Reform Commission's journal, *Reform*, Autumn 2004, p. 4.

85 Section 35 states that the hearing of a proceeding before the Tribunal shall be in public, *Administrative Appeals Tribunal Act 1975.*

86 Section 35—Hearings to be in public except in special circumstances, *Administrative Appeals Tribunal Act 1975.*

87 Administrative Appeals Tribunal, *Introduction to the AAT,* AAT website, http:www.aat.gov.au/AboutTheAAT/Introduction ToTheAAT.htm (3 June 2005). See also Michael Sassella, Senior Member, AAT, 'Reviewing Particular Decisions made by ASIO: the Security Appeals Division of the Administrative Appeals Tribunal', Attorney-General's Department, Security in Government 2002 Conference.

- the AAT'S process allows for the involvement of experts in the subject under consideration and recognises that 'experts contribute substantially to the quality of decisions';[88]

- sittings of the Tribunal are held from time to time as required and may sit at any place in Australia or in an external Territory;[89] and

- a party to a proceeding before the Tribunal may appeal to the Federal Court of Australia, on a question of law, from any decision of the Tribunal in that proceeding.

12.118 Generally, the Tribunal is required to provide a copy of its decision to each party to the proceeding. For reasons of transparency, the committee anticipates that a similar provision would apply to the Military Division of the AAT which would provide a copy of its findings to the chair of the ADFARB, the CDF as well as PAPs. It accepts that an additional provision may need to be inserted in the AAT Act to allow certain restrictions to apply to the release of parts of the report on grounds of national security or public interest. The Act has been amended along such lines to accommodate the special requirements of the Security Appeals Division.

12.119 The committee believes that the Government must take firm and decisive measures to enhance the independence of the current BOI process and therefore supports Mr Griffin's proposal.

Recommendation 34

12.120 The committee recommends that:

- **all notifiable incidents including suicide, accidental death or serious injury be referred to the ADFARB for investigation/inquiry;**

- **the Chairperson of the ADFARB be empowered to decide on the manner and means of inquiring into the cause of such incidents (the Minister for Defence would retain absolute authority to appoint a Court of Inquiry should he or she deem such to be necessary);**

- **the Chairperson of the ADFARB be required to give written reasons for the choice of inquiry vehicle;**

- **the Government establish a military division of the AAT to inquire into major incidents referred by the ADFARB for investigation; and**

---

88 The Hon Justice Garry Downes, President of the Administrative Appeals Tribunal, 'Future Directions ', Speech to the Australian Institute of Administrative Law's Forum, 'Administrative Law: Problem areas—Reflections on practice', Annual Dinner, 4 July 2003.

89 *Administrative Appeals Tribunal Act 1975,* section 20A.

- **the CDF be empowered to appoint a Service member or members to assist any ADFARB investigator or AAT inquiry.**

Chapter 13

Disciplinary and adverse administrative action

The disciplinary and administrative components of the military justice system

13.1 Adverse administrative action can follow from a DFDA matter, a civilian criminal charge or an administrative inquiry. It is intended as a management tool to correct or deal with unacceptable or unprofessional behaviour. It may take the form of a warning, a formal censure, reduction in rank, removal from posting or appointment, disallowance of pay and other financial entitlements or even termination of enlistment or appointment.

13.2 The ADF makes a clear distinction between action taken for breaches of the disciplinary system and those of the administrative system.[1] In the military justice system, disciplinary offences are specified in the DFDA and cover a range of activities or offences. There are, however, many contraventions of rules and regulations that are not punishable under the DFDA but are nonetheless subject to formal censure and punishment under administrative procedures. Defence Manual ADFP 06.1.3 notes that:

> Adverse administrative action is usually initiated and/or imposed when the conduct or performance of a member is below the standard expected of a particular member and is not in the interests of the ADF. It is official action that reflects formal disapproval on a temporary or permanent basis.

13.3 Although the advice is clear in directing that offences under the DFDA are to be dealt with under the disciplinary system, there appears to be scope in determining whether disciplinary or administrative action will be taken. One witness told the committee that 'they flip-flop between administration and discipline'.[2]

Deciding on disciplinary or administrative action

13.4 Generally, the decision to impose adverse administrative action is discretionary. In exercising this discretion, a decision-maker must comply with the requirements of administrative law. The Manual advises that:

> In determining what, if any, adverse administrative action should be taken, the merits, circumstances and the sufficiency of evidence in each case must be reviewed. A decision whether or not to impose adverse administrative action depends on the seriousness of each case and the interests of the ADF.[3]

---

1 See for example ADFP 06.1.3 para. 1.1.

2 In camera *Committee Hansard*, 10 June 2004, p. 94.

3 ADFP 06.1.3, para. 1.11.

13.5 Elaborating on this point, Lieutenant General Leahy told the committee that the commanding officer is required to make the judgement based on offences in the DFDA as to whether administrative or disciplinary action is appropriate.[4] He used the following example:

> …when a soldier has not done something or has done something overtly that he should not have done—he has contravened standing orders or he has carried out actions that he should not have done—it goes through an administrative process. Normally—and it is hard to say, locked tight, that this is what happens each time—there would be an investigation of some type and the investigating officer would determine that an individual has done something wrong or that an individual has not done something that he should have. What is open to us then is that we can take either disciplinary action or administrative action.[5]

13.6 The Manual provides some guidance on the matters that should be taken into account when considering adverse administrative action. It explains that 'adverse administrative action can be taken instead of, or in addition to, disciplinary proceedings under the DFDA or civilian court proceedings.[6] It concludes:

> In determining what, if any, adverse administrative action should be taken, the merits, circumstances and the sufficiency of evidence in each case must be reviewed. A decision whether or not to impose adverse administrative action depends on the seriousness of each case and the interests of the ADF. Guidance on what conduct or performance warrants initiation of adverse administrative action is contained in Defence Instructions and policies, such as those dealing with theft, the use of drugs, censures, and warnings.[7]

13.7 This authority to choose between the alternative courses provides the commander or other decision-maker with flexibility and allows account to be taken of the particular circumstances surrounding the breach. However, it may also produce uncertainty and a lack of consistency in the general operation of both systems. Some may see too much scope for subjectivity or arbitrariness in exercising this discretion to pursue one course of action over another. Colonel Hevey gave an example of where an officer is likely to recommend administrative procedures:

> …that a first-year soldier might inadvertently put in a wrong claim. That would not go to a Defence Force magistrate's hearing; that would normally

---

4 *Committee Hansard*, 5 August 2004, p. 17.

5 *Committee Hansard*, 5 August 2004, p. 6.

6 ADFP 06.1.3, para. 1.9. The Manual further explains that guidance on when DFDA action should be taken or matters referred to the civilian authorities is contained in DI(G) PERS 45–5—Australian Defence Force Prosecution Policy and DI(G) PERS 45–1—Jurisdiction under the Defence Force Discipline Act—Guidance for Military Commanders.

7 ADFP 06.1.3, para. 1.11.

> be counselling, unless there was some criminal intent. Those are normally the sorts of matters that go to the Defence Force magistrate.[8]

13.8 The distinction seems to relate to the gravity of the wrongdoing and its potential to cause harm. In other words, a contravention deemed to be an administrative offence would fall short of a criminal offence. Consequently, the severity of a punishment assigned to an administrative contravention should not be oppressive or carry with it the stigma attached to a criminal conviction. Colonel Harvey reminded the committee that, while not a punishment under the DFDA, adverse administrative action is widely regarded by ADF members as a form of 'punishment'.[9]

Views on the current relationship between the disciplinary and administrative components of the military justice system

13.9 Some witnesses expressed dissatisfaction with the way in which the disciplinary and administrative systems intersect. The Australian Defence Association thought there was a serious problem with the incorrect use of the administrative law processes and with what it perceived as 'a growing reluctance to use the disciplinary code in certain circumstances'. It submitted:

> There is an unfortunate and strengthening tendency instead to wrongly use administrative processes to investigate and/or punish alleged criminal acts or disciplinary transgressions by Service personnel.[10]

13.10 In looking at both the disciplinary and administrative components of the military justice system, the report has shown that they are indeed two separate systems with their own distinct procedures, offences and penalties. The committee would be concerned if administrative action were used solely because of a perceived difficulty in successfully prosecuting a particular breach or offence.

13.11 Mr David Richards, a barrister and solicitor responsible for the management and conduct of the national military practice in a large private law firm, argued that 'a line needs to be drawn between administrative discipline and criminal discipline'. He supported the proposal:

> …that the CDF should have absolute control over the administrative system, which would include insubordination offences. The insubordination offences and the control type offences may very well have criminal imprisonment or fines of that nature; I do not have an issue with that. What I do have an issue with is this: if somebody leaves the Defence Force with a criminal conviction, whether they are asked to leave or otherwise, to the outside world that person has a criminal conviction. If they leave the Defence Force with an administrative conviction for discipline,

---

8 *Committee Hansard,* 1 March 2004, pp. 65–6.

9 *Submission P64*, p. 5.

10 *Submission P 39*, p. 4.

> notwithstanding what the penalty might be, that is a completely different issue. If the military wishes to provide serious sanctions to maintain their discipline within the military, that is fine; I do not have an issue with that at all.[11]

13.12 The Burchett Report referred to minor infringements under the DFDA such as speeding on base. It noted the findings in the 1988 Report of the Judge Advocate General which stated:

> I consider that there is a need for a system of minor non-judicial punishments such as extra duties for minor singularly disciplinary offences rather than having to comply with all the panoply of a trial under the adversary system … [12]

13.13 It also cited the 1989 Report of the Defence Force Discipline Legislation Board Review which stated:

> The Board is firmly of the view that in the case of infringements which are purely disciplinary and which are neither serious nor of a criminal nature it is essential that a system be established which will enable such infringements to be dealt with speedily and without formality but which, at the same time, will adequately protect defence members from unfair treatment.[13]

13.14 To deal with misdemeanours such as minor traffic offences, the Burchett Report suggested the introduction of legislation enabling a ticket, like that used by the police in various civil jurisdictions, to be issued. It would seem to the committee that, in cases where a breach of the law or rules is of a minor nature and where little discretion is required in determining the guilt of an alleged offender, a quick and straightforward administrative device to deal with the transgression would be fairer and more cost effective.[14]

13.15 The Burchett Report also referred to 'extras' and suggested that 'guidelines should make it clear that, as a matter of policy, extras are to be regarded as an

---

11 *Committee Hansard*, 9 June 2004, pp. 44–5 and 48.

12 Report into Military Justice in the Australian Defence Force, conducted by Mr J.C.S.Burchett, QC, An Investigating Officer appointed by the Chief of the Defence Force, under the Defence (Inquiry) Regulations 1985, p. 76.

13 Report into Military Justice in the Australian Defence Force, conducted by Mr J.C.S.Burchett, QC, An Investigating Officer appointed by the Chief of the Defence Force, under the Defence (Inquiry) Regulations 1985, pp. 76–7.

14 Report into Military Justice in the Australian Defence Force, conducted by Mr J.C.S.Burchett, QC, An Investigating Officer appointed by the Chief of the Defence Force, under the Defence (Inquiry) Regulations 1985, p. 17.

administrative response that may be appropriate in some cases, falling outside the disciplinary measures established by the Defence Force Discipline Act'.[15]

13.16 The Burchett Report recommended, *inter alia*, that consideration be given to reviewing the nature of the punishments that may be imposed under the AFDA in the light of contemporary standards.[16] The United Kingdom Government is currently reviewing its Service offences. It recognises the importance of keeping in step with changes in the civilian criminal justice system and of benefiting from recent judicial interpretation.[17] The Australian military justice system appears due for a similar review.

Committee view

13.17 Clearly, a number of witnesses were concerned about the grey areas that have developed between the disciplinary and administrative systems. In light of these concerns and the recommendation by the Burchett Report, it appears that a review of the penalties imposed under the military justice system is long overdue. The time for review is also fortuitous in that a significant body of work has recently been done by the Australian Law Reform Commission on criminal, civil and administrative procedures and penalties.

13.18 In March 2003, following a period of public debate, the Australian Law Reform Commission produced a report, *Principled Regulation: Federal Civil and Administrative Penalties in Federal Jurisdiction.* This comprehensive report identified clear principles intended to ensure that there is a fair, effective and workable system of decision making and enforcement. It provides an extensive discussion on matters such as the distinctions between criminal and administrative procedures and would serve as a useful starting point and guide for the review.

Recommendation 35

13.19 Building on the report by the Australian Law Reform Commission, *Principled Regulation: Federal Civil and Administrative Penalties in Federal Jurisdiction*, the committee recommends that the ADF commission a similar review of its disciplinary and administrative systems.

---

15 Report into Military Justice in the Australian Defence Force, conducted by Mr J.C.S.Burchett, QC, An Investigating Officer appointed by the Chief of the Defence Force, under the Defence (Inquiry) Regulations 1985, p. 85.

16 Report into Military Justice in the Australian Defence Force, conducted by Mr J.C.S.Burchett, QC, An Investigating Officer appointed by the Chief of the Defence Force, under the Defence (Inquiry) Regulations 1985, p. 32.

17 Ministry of Defence, *Memorandum from the Ministry of Defence, 'Tri-Service Armed Forces Bill.*

13.20 The intention is to help the ADF better delineate between the two systems, improve its administrative procedures and review and change where appropriate the penalties for administrative contraventions.

13.21 The Minister for Defence may wish to seek the assistance of the Attorney-General in having the matter of the disciplinary and administrative military justice systems referred to the Australian Law Reform Commission to conduct the suggested inquiry. The Australian Law Reform Commission could draw on the expertise and experience it gained while inquiring into Federal civil and administrative penalties.

Double jeopardy

13.22 Where an overlap occurs between the disciplinary and administrative system, the question also arises about the potential use of evidence gathered for one proceeding to be used in the other and about the protection against double jeopardy. The principle behind double jeopardy is that a person should not be punished twice for what is substantially the same act and should not be unfairly subject to the two procedures because of vexatious motives.

13.23 The danger with double jeopardy in the ADF is that the relevant Defence Service may make repeated attempts to punish an individual for substantially the same offence putting the accused through unnecessary ordeal and delaying the process.

13.24 Two cases in particular raised concerns. In each case disciplinary action had been taken unsuccessfully against a member but was followed almost immediately by administrative action for what appeared to be substantially the same alleged action. One witness gave the example of a staff cadet who was charged, tried and punished over an incident. Two month's later, on legal advice, the charge was quashed and expunged from the Cadet's personal record. An apology was offered and the Cadet told that no further disciplinary action would be taken. According to the witness, 'without pause, the Cadet was then told that, notwithstanding the quashing and expunging of the charge', administrative action would be pursued.[18]

13.25 Mr Neil James, Australia Defence Association, was concerned about cases where, in his view, the double jeopardy principle has been undermined. He told the committee:

> They are saying that proceeding against people administratively means they are not actually on trial, so therefore it is not double jeopardy. The position of the Australia Defence Association is that, yes, in black letter law that is correct. However, we think that in too many cases it is quite specious because it does not look at the effect of what happens. The effect of what happened to the SAS soldier in question was quite simply that he was charged under the Defence Force Discipline Act and acquitted. Because the ADF felt that there were some aspects of the case that required further investigation, they proceeded against the individual administratively to

18 Confidential *Submission C26*, p. 2.

> show notice to show cause through the normal procedure. Our argument is that that was probably wrong morally. He had actually been acquitted and that should have been the end of it. I think the real problem here is that the effect is double jeopardy. In this case they proceeded against the SAS member because there appeared to the lawyers to be no other way they could air the evidence. If they had adjusted some of their inquiry procedures, there may have been a better way of airing some of that evidence than proceeding against the individual, who was put through a very harrowing experience, we believe, unnecessarily. Quite frankly, it was probably an abuse of his human rights in the long run.[19]

He asserted that people are 'either guilty of a disciplinary offence or they are not'.[20]

Committee view

13.26 The committee has recommended that the ADF commission a review of its disciplinary and administrative system. Given that concerns have been expressed about double jeopardy, the committee believes that these concerns could be considered by the proposed review.

Recommendation 36

13.27 The committee recommends that the committee's proposal for a review of the offences and penalties under the Australian military justice system also include in that review the matter of double jeopardy.

13.28 In addition to addressing and rectifying the piece-meal approach to reform of the military justice system, the committee believes that close, careful and regular monitoring is required to ensure that those steps taken by the ADF to improve the military justice system are having the desired results. As a result, the committee has resolved to take an active parliamentary role in examining the effectiveness and fairness of the military justice system on an ongoing basis. To assist the committee in this task, the committee has suggested that the ADF submit an annual report to the Parliament on its military justice system.

Recommendation 37

13.29 The committee recommends that the ADF submit an annual report to the Parliament outlining (but not limited to):

- **(a) The implementation and effectiveness of reforms to the military justice system, either in light of the recommendations of this report or via other initiatives.**
- **(b) The workload and effectiveness of various bodies within the military justice system, such as but not limited to;**

---

19 *Committee Hansard*, 9 June 2004, pp. 32–4.

20 ibid.

- **Director of Military Prosecutions**
- **Inspector General of the ADF**
- **The Service Military Police Branches**
- **RMJ/CJA**
- **Head of Trial Counsel**
- **Head of ADR.**

Part IV

Other important matters that relate to the military justice system

The report has clearly identified problems in Australia's military justice system.

The final Part of the report deals with matters that did not fit neatly within with scope of the examination of the military justice system. Although they deal with a specific aspect of the ADF, they are nevertheless connected closely with the system:

- the inquiry into the suspension of Cadet Sergeant Eleanore Tibble—in particular, the lack of action taken where sexual impropriety may have been at issue, and the particular procedural fairness issues that relate to the rights of children; and
- mental health issues and the military justice system.

Chapter 14

Australian Defence Force Cadets

14.1 Under the terms of reference, the committee was asked to inquire into the suspension of Cadet Sergeant Eleanore Tibble. This incident opened up for investigation a specific area of the military justice system that deals specifically with the ADF's work with Australia's youth through the Australian Defence Force Cadets (ADFC) programme.

14.2 The suspension and subsequent death of Eleanore Tibble highlighted accountability and management issues in the ADFC. This is an organisation staffed mainly by volunteers. The case also brought to light the uncertain legal relationship that exists between the ADFC and the ADF. This chapter examines the status of the ADFC in relation to the ADF and the bearing that this has on both the accountability of cadet staff and the way in which the ADFC or the ADF handle allegations of misconduct by cadets.

The Australian Defence Force Cadets—structure and organisation

14.3 The ADFC includes all three cadet organisations—the Australian Air Force Cadets, the Australian Navy Cadets and the Australian Army Cadets. As mentioned above, these organisations are largely volunteer organisations and involve approximately 27,000 young Australians aged between 12½ and 20 years. They participate in their chosen cadet organisation at approximately 490 locations around Australia. The cadets are led by over 2,600 volunteer staff.[1]

14.4 Air Commodore Peter McDermott advised the committee that those staff members are drawn from a wide variety of professions in the general community:

> …they volunteer their time for a series of reasons. Some are parents who want to be actively involved in their teenagers' activities; some have been recruited into the organisation for their special skills; some have been cadets themselves and want to give something back to the organisation; and for some it represents their chosen form of volunteerism in the Australian community.[2]

14.5 It is important to state at the outset that neither the cadets nor many of the staff of the ADFC are members or reserve members of the ADF. Not being members of the ADF means that they do not fall under the same military justice system as the

---

1 Air Commodore McDermott, *Committee Hansard*, 21 June 2004, p. 45.

2 ibid., p. 46.

ADF.[3] This has implications for the way in which discipline and justice are administered within the ADFC and between the ADF and the ADFC.

14.6 The ADFC is administered by the relevant Service chief in accordance with the enabling legislation for cadets in the *Defence Act 1903*, the *Naval Defence Act 1910*, the *Air Force Act 1923* and the subordinate cadet force regulations last amended in 1977. The administration of those cadet corps is effected through the respective cadet policy manuals. The control that Service Chiefs have over their respective cadet organisation is essentially an administrative control rather than a command control.[4] This provides the authority for administrative action and inquiries (rather than disciplinary) into serious incidents within the cadet organisations.

14.7 In relation to the accountability of cadet staff, the cadet manuals explain that administrative processes may be used to deal with improper conduct, but the extent of that administrative action is counselling or dismissal. There is no provision for disciplinary action against staff.[5] Similarly, cadet manuals provide for administrative action against cadets by staff for failure to abide by the code of conduct.[6]

14.8 There have been significant changes to support the administration and training of cadet staff in recent years. Many of these changes are the result of the death of Eleanore Tibble on 27 November 2000.

14.9 Immediately prior to her death, Eleanore was the subject of administrative action by staff of No 5 Wing for allegedly fraternising with an adult cadet instructor. The ADF's handling of the investigation into her suspension has provided the background to the committee's examination of the current status of the cadet organisations.

Cadet Sergeant Eleanore Tibble—a case study

14.10 Cadet Sergeant Tibble took her own life at her home in Tasmania on 27 November 2000 at the age of 15. At the time of her death, she understood that she was to be discharged from the Air Cadets as a result of an allegation that she had fraternised with an adult cadet staff member.

14.11 She was unaware that two weeks prior to her death, the Deputy Director Reserve Personnel Cadets had given a direction to the Officer Commanding 5 Wing that she was to be retained in the cadets because the discharge proposal was unfounded. That direction was never carried out.

---

3 Members of the ADFC that are full members of the ADF or Reserve members of the ADF are subject to the ADF military justice system.

4 Air Marshal Houston, *Committee Hansard*, 1 March 2004, p. 48. See also, Air Commodore McDermott, *Committee Hansard*, 21 June 2004, p. 50.

5 *Committee Hansard*, 21 June 2004, p. 45.

6 See discussion *Committee Hansard*, 1 March 2004, pp. 48-51.

Investigation and handling of initial allegation of fraternisation

14.12 At the time the allegation of fraternisation was made against Eleanore, the relevant policy instruction was outlined in Chapter 7 of *Defence Instruction (Air Force) AAP 5110.001 Air Training Corps Manual of Management Fourth Edition* of 27 November 1994, 'Conditions of Service for Cadets'. The policy provided that a cadet may be discharged by a CO if the member is unsuitable to be a cadet.[7] Unacceptable behaviour that may determine an individual's suitability for retention in the AIRTC included 'unhealthy or unacceptable fraternisation with other members'.[8]

14.13 In line with principles of natural justice, however, the policy expressly provided that a cadet should not be discharged for that reason (or a number of others) without having been notified in writing by their CO of the reason for intended discharge and he or she being given the opportunity to contest the discharge.[9]

14.14 The committee received evidence from Mrs Susan Campbell, Eleanore's mother. In light of the above policy, the main concerns expressed by Mrs Campbell related to the treatment of Eleanore by the Tasmanian Squadron Air Cadet Corps (TASAIRTC) following the initial allegation in August 2000 and prior to her death.

14.15 Mrs Campbell's concerns are that principles of natural justice were not applied to her daughter, procedures appropriate to counselling minors were not followed and that Eleanore was discriminated against and victimised. Mrs Campbell was particularly concerned about the initial interview of Eleanore conducted by a senior staff member on 5 October 2000. She believed that Eleanore was given no prior notice of the interview, agenda or issues to be considered in order for her to prepare. Importantly, Mrs Campbell also stated that the interview took place without her knowledge or consent as the mother of a 15-year-old cadet and Eleanore was not provided with an 'airman's friend' for support during that interview.

14.16 At the conclusion of the interview on 5 October 2000, a senior staff member advised Eleanore that he would speak to her again after he had consulted the CO. However, Eleanore received no further advice until 30 October 2000. This was a telephone direction to resign or have her service terminated, with no reasons provided for that direction. Mrs Campbell stated that Eleanore was informed that she had brought dishonour upon the Flight and that Eleanore understood from the phone call that she had no right of appeal against the direction to resign (or her service would be terminated).

---

7 *Defence Instruction (Air Force) AAP 5110.001 Air Training Corps Manual of Management Fourth Edition* of 27 November 1994, Chapter 7, paragraph 709 (a).

8 *Defence Instruction (Air Force) AAP 5110.001 Air Training Corps Manual of Management Fourth Edition* of 27 November 1994, Chapter 7, paragraph 710 (f).

9 *Defence Instruction (Air Force) AAP 5110.001 Air Training Corps Manual of Management Fourth Edition* of 27 November 1994, Chapter 7, paragraph 711.

14.17 It is evident to the committee that the timeframe of this process and the fact that Cadet Sergeant Tibble was never advised that ADFC Headquarters had directed that she be retained in the cadets some two weeks prior to her death, demonstrates a lack of procedural fairness and sensitivity toward children. The other person involved in the alleged fraternisation was never formally interviewed or 'charged' with any offence because he had resigned from the organisation thereby leaving the organisation with no authority over him.

14.18 Since Eleanore's death, Mrs Campbell has expressed concern and frustration about the difficulties in gaining access to her daughter's file or staff from the TASAIRTC and her inability to obtain information other than applying through Freedom of Information (FOI).[10]

Investigation following the death of CSGT Tibble

14.19 In cases such as Eleanore's, there is no mandatory direction for the cadet organisations or the overarching Service to conduct an investigation either into the death of a cadet or the circumstances surrounding a suspension. Because of this, Mrs Campbell advised the committee that the resulting investigation by the RAAF was due to her making a submission to the military justice audit conducted by Mr James Burchett QC in 2001.[11] The Tasmanian Coroner investigated Eleanore's death.

14.20 Mr Burchett assessed Mrs Campbell's submission as being outside the terms of reference of the audit but nevertheless, referred the matter to RAAF Headquarters. After doing so, Group Captain Stunden was appointed as Investigating Officer (IO) on 30 March 2001. Terms of reference for an internal investigation were subsequently drafted addressing the administrative processes surrounding the suspension of Cadet Sergeant Tibble.

14.21 In addition to interviewing Mrs Campbell, the IO interviewed relevant officers at the Kempton Police Station responsible for investigating Eleanore's death for the coroner and all relevant Air Force and Air Training Corps personnel other than the other person involved in the allegation of fraternisation who, as mentioned earlier, had resigned.

14.22 Virtually all Mrs Campbell's original concerns were confirmed by the IO. In particular, the IO found that:[12]

- an appropriate person was not in attendance at the interview on 5 October 2000 to provide Eleanore with support;
- Eleanore was not given adequate opportunity to provide her version of events;

---

10 Susan Campbell, *Committee Hansard*, 21 April 2004, pp. 4-5, 13, 17.

11 Susan Campbell, *Committee Hansard*, 21 April 2004, p. 5.

12 Inquiry into the Administrative Process and Procedures Surrounding the Suspension of CSGT Eleanore Tibble G1465 – Investigating Officers Report, pp. 17-19.

- the senior staff member did not follow up on his clear commitment to Eleanore and advise her of the outcome of subsequent discussions with the CO;
- TASAIRTC officers did not exhibit any appreciation that they were dealing with an adolescent and that the circumstances required special skills and attention;
- TASAIRTC officers showed no obligation to explain to the 15-year-old cadet exactly what it was that she had done wrong;
- the way TASIARTC staff dealt with Eleanore could be viewed as victimisation; and
- the inordinate delays in the process were unacceptable.

Procedures for dealing with a minor

14.23 The IO's finding that TASAIRTC officers did not exhibit any appreciation that they were dealing with an adolescent is a serious matter. The committee's fundamental concern is that the numerous people involved in this case failed to recognise or understand that this may have been a case of child sexual assault and no action was taken to address that possibility.

14.24 In the committee's view, this failure to take prompt action where child sexual misconduct may have been at issue represents a serious human rights breakdown by TASAIRTC (as in a loco parentis relationship). Furthermore, as time passed and investigations were undertaken after her death, this matter was not at the forefront of the ADF's concerns. There appears to have been a complete failure on the ADF's part to comprehend the significance of what had happened and to appreciate that they had a duty of care to protect a minor from harm.

14.25 On 9 May 2005, the Human Rights and Equal Opportunity Commission tabled a report which dealt with the circumstances of Eleanore Tibble's dismissal. It considered whether the Commonwealth of Australia breached her rights under the Convention on the Rights of the Child. The Commission's findings strengthen those of the Committee's. Mr John von Doussa, President, HREOC, found *inter alia*, that TASAIRTC or TASAIRTC officers:

- failed to recognise the need to consider the interests of the child as paramount;
- failed to take into account as a primary consideration Ms Tibble's best interests;
- failed to protect Ms Tibble from humiliation that might result in psychological harm; and
- failed to take all appropriate administrative, social and educational measures to protect Ms Tibble from 'neglect or negligent treatment'.

14.26 Of particular interest to the committee, is the Commission's response to the Commonwealth's submission to the Commission's preliminary findings that officers failed to take account of the serious nature of allegations of a sexual nature involving a child. After considering the submission, the Commission found that:

> There was no understanding by the officers involved (and I would add, the lawyers who apparently gave legal advice that 'Ms Tibble should be asked to resign') that there may have been an issue of child sexual abuse. That likelihood was plainly raised by the initial belief that there had been a sexual relationship involving a 15 year old girl, and then by her statement in the Record of Interview, that she had not reported the relationship because of fear of threats from her superior.
>
> Instead of immediately taking steps to ensure the protection of the child, the likely victim of a situation which those in loco parentis had the obligation to prevent, the processes which took place sought to discipline the victim. This is a serious human rights failure which occurred.
>
> **It is one thing that the failure occurred in the first place, perhaps as a consequence of inadequate guidance in policy manuals and inexperience and lack of training of the officers concerned. It is quite another thing that long after the event, after investigation and time for consideration and change of policies, that formal submissions directed at minimising and trivialising the failures should be made which still fail to recognise and acknowledge the significance of what happened.** It is reasonable to assume that formal submissions made by lawyers in a matter of the seriousness of this one would be thoroughly considered submissions made on instructions from a senior level in the Department of Defence.[13] (emphasis added)

14.27 These concerns are consistent with other evidence received by the committee in relation to the handling by the ADFC or the ADF of allegations against cadets and cadet staff.[14] That evidence concerns a cadet who is still a minor and therefore, the committee does not consider it appropriate to discuss the detail of that complaint. However, the committee is of the view that similar to the case of Eleanore Tibble, officers in the ADFC, following allegations made against a young cadet, failed to recognise and fulfil their duty to place the interests of that cadet first. It notes the apparent condoning of harassing behaviour toward the accused cadet by other cadets and a failure of the organisation to investigate the allegations adequately (at least in the view of the parents of the cadet and the committee). In this instance, the suspected offence was also reported to the Police. However, this does not detract from the actions and allegations surrounding the cadet unit that needed also to be dealt with.

---

13 The Human Rights and Equal Opportunity Commission Report No. 29, *Report of an inquiry into complaints by Ms Susan Campbell that the human rights of her daughter were breached by the Commonwealth of Australia under the Convention on the Rights of the Child,* p. 29. Emphasis added.

14 Confidential *Submissions*, *C23* and *C23A*.

14.28 The Defence Force Ombudsman has also recently investigated the complaint of a young person (under the age of 18) of an incident involving unacceptable behaviour at a Navy training establishment in mid-1996. His findings again suggest the need for the ADF to take strong and immediate action to rectify serious problems in their practices and procedures for dealing with matters involving young people and sexual impropriety. The Ombudsman recommended that:

- the RAN provide training to RAN Police Coxswains on investigative technique, and monitor their investigations, to ensure that interviews are tape recorded, records are complete, questioning is undertaken appropriately, and that young persons are treated in a manner that acknowledges their age, level of experience and need for support in such situations; and
- the RAN instructions in relation to the investigation of alleged sexual assault be revised to require that such cases be referred to the civilian police at an early stage.[15]

14.29 The committee is highly critical of the ADF's lack of appropriate action where allegations were made of a sexual nature involving minors. There appears to be two major issues in the handling by the ADF of allegations that personnel including cadets have been mistreated. Firstly, there is no real awareness of the correct way to approach such allegations—particularly the prompt reporting of any suspicion of child sexual assault to civilian police. Secondly, there are no effective mechanisms in place to address such issues in a systematic and efficient manner.

Acknowledgement of shortcomings and remedies

14.30 The Chief of Air Force advised the committee that with hindsight, an investigation into the circumstances surrounding the suspension of Eleanore should have been initiated earlier but it was assumed that the coroner's investigation would suffice:

> It would appear that there was a meeting in early December, a week after the tragic death of Ellie, and the discussion was that there would be a coroner's inquiry, and because there was a coroner's inquiry I think there was an assumption that all the matters to do with this would be taken up in that coroner's inquiry. With the benefit of hindsight, I think that was a mistake. In my view it was absolutely imperative to investigate the processes that surrounded the suspension of Ellie Tibble and why she was not reinstated when it became clear that the relationship was a friendship.[16]

14.31 The Air Force has advised the committee and Mrs Campbell on a number of occasions that it deeply regrets the death of Cadet Sergeant Tibble and acknowledges

---

15 Commonwealth Ombudsman, *Report into the investigation of a complaint by a young person (under the age of 18) of an incident involving unacceptable behaviour at a Navy training establishment in mid-1996.*

16 Air Marshal Houston*, Committee Hansard*, 1 March 2004, p. 51.

that there were significant defects in the manner in which this matter was handled. The Air Force acknowledges the shortcomings to have included:[17]

- inadequate record-keeping;
- deficiencies in policy in relation to the requirement to involve parents and guardians during counselling and interviews with cadets; and
- deficiencies in training for Australian Air Force Cadets staff in personnel management and in particular in managing and developing adolescents.

14.32 In addition, the Minister for Defence, in a letter to Mrs Campbell dated March 2002, stated that 'to the extent that the actions surrounding the handling of Eleanore's suspension contributed to Eleanore's death is a matter of deep regret'.[18]

14.33 All but one recommendation arising out of the IO Report have been implemented. The outstanding recommendation relates to administrative action against one of the staff members involved. That matter is still continuing and subject to further review.

14.34 The Chief of Air Force advised the committee that following the findings and recommendations of the Stunden Report, administrative support manuals and guidelines have been revised and updated to clearly state procedures and processes to be followed in the management of young people in the cadets, including:[19]

- cadet instructions strengthened to provide specific guidance to adult volunteer staff in the management of adolescents; and
- revision of cadet policy manuals to include codes of behaviour for staff that detail the administrative procedures and practices to be followed when dealing with minors, including mandating occasions when communication is required with parents or guardians.

14.35 The training of adult volunteer staff has also been updated and made more relevant, including:[20]

- training programs for cadet officers and instructors that place particular emphasis on developing skills to work effectively with adolescents; and
- training modules in a range of subject areas, including equity and diversity, legal principles and implications for cadet members, the psychology of

---

17 Department of Defence, *Submission P16*, p. 88.

18 Maria Campbell, *Committee Hansard*, 21 April 2004, p. 18.

19 *Submission P16*, pp. 88-89. (ADF) See also, Air Marshal Houston, *Committee Hansard*, 1 March 2004, p. 46 and Air Commodore McDermott, *Committee Hansard*, 21 June 2004, p. 45.

20 Department of Defence, *Submission P16*, pp. 88-89. See also, Air Marshal Houston, *Committee Hansard*, 1 March 2004, p. 46 and Air Commodore McDermott, *Committee Hansard*, 21 June 2004, p. 45.

adolescent behaviour, the management of behaviour modification, the management of due process, and occupational health and safety.

14.36 The Chief of Air Force also advised the committee that existing staff are receiving instruction on the above subjects, and the modules have been incorporated into the initial training program that all staff undergo on joining the cadets. The training is also now included in cadet recruitment, promotion and command courses to ensure ongoing awareness at all stages of the training and development continuum.[21]

14.37 In addition, the ADFC is also moving forward with a number of activities which are preventative in nature relating to suicide awareness and crisis response involving the Directorate of Mental Health and the Defence Community Organisation.[22]

14.38 The committee was advised that the Air Force investigation took into account Mrs Campbell's concerns about the handling of the allegations of fraternisation and the subsequent suspension of her daughter. Mrs Campbell was provided with a full and uncensored copy of the final report of the inquiry.[23]

14.39 Mrs Campbell was given the opportunity to review the proposed changes in policy and training from a parental perspective. One of the suggestions Mrs Campbell made was for cadets to be allowed access to Defence Community Organisation staff in circumstances where they felt they could not raise issues with their instructors. Air Force agreed with Mrs Campbell, and that change was also incorporated into cadet policy.[24]

14.40 It is sad to all concerned, and devastating to the family, that it took the death of a young cadet to initiate such action on the part of the ADF.

14.41 Similar to a number of other issues contained in this report, the committee is of the view that administrative investigations into situations that involve such serious circumstances and particularly those involving a death should be mandatory, not discretionary. However, whilst the administrative investigation by the RAAF could have been initiated immediately following the death of Eleanore, the committee is generally satisfied with the steps taken by the Air Force following the investigation process and the subsequent changes to policies and procedures in relation to cadets.

---

21 Department of Defence, *Submission* 16, p. 89. See also, Air Marshal Houston*, Committee Hansard*, 1 March 2004, p. 46.

22 Air Commodore McDermott, *Committee Hansard*, 21 June 2004, p. 46.

23 Whilst Mrs Campbell was provided by the RAAF with a full copy of the Stunden Report, the Committee understands that Mrs Campbell's initial request for that report was through Freedom of Information.

24 Department of Defence, *Submission P16*, p. 89. See also, Air Marshal Houston, *Committee Hansard*, 1 March 2004, p. 46.

14.42 The HREOC also examined the measures taken by the Department of Defence to rectify deficiencies in its policy and procedural manuals and training program for Australian Air Force Cadets staff. It considered that the Policy Manual does not provide 'adequate guidance to officers that situations can arise, particularly where sexual impropriety is suspected, where the primary interest of cadets make it inappropriate that any of the disciplinary measures contemplated…be undertaken.'[25]

14.43 The committee notes this finding and supports HREOC's recommendation that the Manual contain advice that:

> …those who have the responsibility of dealing with cadets that they should always be alive to the possibility that inappropriate behaviour by a cadet may be the result of influence or pressure from a superior to which the cadet has succumbed. In those situations the primary interest of the cadet require sympathetic support and protection—not warnings or counselling that is predicated on blameworthy conduct having occurred.[26]

14.44 The Commission also recommended that the syllabuses for training programs for officers and instructors should be 'checked to ensure that instruction is given on what is required and when to ensure that the best interests of cadets who are minors are the primary consideration when dealing with allegations of inappropriate conduct'. It suggested further that the conduct of training instruction are matters upon which expert advice should be sought including from an expert in the human rights of children.[27]

Monitoring of implementation—preventing a recurrence

14.45 The Committee recognises that extensive and appropriate changes have been put in place by the Australian Air Force Cadets in relation to the management of a minor who is thought to have breached the standards of behaviour.

Recommendation 38

14.46 To ensure that the further development and implementation of measures designed to improve the care and control and rights of minors in the cadets are consistent with the highest standards, the committee suggests that the ADF commission an expert in the human rights of children to monitor and advise the ADF on its training and education programs dealing with cadets.

---

25 The Human Rights and Equal Opportunity Commission Report No. 29, *Report of an inquiry into complaints by Ms Susan Campbell that the human rights of her daughter were breached by the Commonwealth of Australia under the Convention on the Rights of the Child*, p. 47.

26 ibid., p. 47.

27 ibid., p. 47.

Resources available to the ADFC

14.47 As mentioned above, the ADFC is essentially a volunteer organisation for staff members although some remuneration is provided. Cadet staff members generally volunteer approximately 4 hours per week, a weekend per year and a camp of one week's duration per year. The reality of that commitment, however, often equates to significantly more hours and the committee is aware that the remuneration provided in many cases is not commensurate with the actual expenses incurred by staff.[28]

14.48 Often, cadet staff members are required to use their full recreation leave entitlement from their full-time positions to accommodate cadet commitments and activities. Whilst this is done in recognition of the worthiness of the organisation, the only time left for formal staff training is additional weekends. The committee is aware that residential courses are also utilised for new staff, but this still requires a new staff member to secure sufficient leave from full-time positions. Given that ADFC staff members are not reservists, they are not entitled to any Defence leave to participate in cadet activities. As a result, there is often a very high staff turnover from trying to balance family life, full-time employment and volunteering with the cadets.

14.49 In terms of administration, it is also worth noting that cadets and staff meet in the evening on their allotted day each week. For many cadet staff, this means that any follow-up of administrative matters has to be done in business hours during their full time jobs. In the absence of any centralised administrative arrangements, it is not surprising that delays might occur when parents attempt to contact senior staff members if it is not on the evening of their child's allocated day of the week.

14.50 As is inevitable when dealing with adolescent children, the committee is aware that formal complaints are made against staff and other cadets. Each of these complaints needs to be investigated with sensitivity and the principles of natural justice need to apply.

14.51 In evidence to the committee, the Chief of Navy acknowledged that the cadet organisations have very little capacity to investigate allegations against cadets or staff when they arise.[29] The committee notes the ADF advice that, when such allegations arise, they are normally investigated by someone appointed from within the ADF.[30] The committee understands from other evidence that those investigations generally only take place after lengthy lobbying and campaigning by the parents involved.

14.52 These issues have also been identified by the Defence Force Ombudsman. As a result of several serious complaints made to the Ombudsman's Office in recent years, concerns have been raised about the adequacy of Defence's administration of

---

28 See also, Air Commodore McDermott*, Committee Hansard*, 21 June 2004, pp. 50-51.

29 Vice Admiral Ritchie, *Committee Hansard*, 5 August 2004, p. 76.

30 Vice Admiral Ritchie*, Committee Hansard*, 5 August 2004, p. 80.

people under the age of 18 years. This has prompted the Ombudsman to conduct an 'own motion' investigation into such matters.[31]

14.53 The Ombudsman's investigation will cover both Service personnel and Defence Force Cadets and the focus of the investigation is to determine whether there are:

- procedures in place which take appropriate account of the lack of maturity and inexperience of young people and their limited capacity to deal effectively with major issues and stresses which can arise as a consequence of defence related activities; and
- mechanisms in place to ensure staff understand, implement and monitor these policies effectively, including dealing with any problems or complaints which might arise.

14.54 The committee will be particularly interested in the report and findings of the Ombudsman on these matters.

14.55 The committee is aware that there are different arrangements in each of the three cadet organisations. For example, the Navy cadets are assisted by management and administrative support from the Navy by way of the appointment of a local naval authority. Army Cadet Headquarters has an army chaplain posted there, and can also call on the assistance of Army psychology. Air Force cadets now have the assistance of the DCO. Air Force is also piloting an arrangement whereby a chaplain and psychologist are located at headquarters as cadet staff (not members of the ADF).[32] Whilst these arrangements are positive and to be encouraged, they do not address the administrative stress on cadet staff.

14.56 The committee also notes the relatively recent announcement of an additional $18 million to the ADFC. However, that injection of funding will not specifically address these issues. It will fund upgraded accommodation, adventure training and new technology[33] (although new technology may go some way toward addressing administrative delays).

14.57 The committee is firmly of the view that the policy and training changes outlined above are very important but, for the reasons just mentioned, the committee is concerned about the implementation of the revised policies and training for staff and cadets. The committee is not convinced that there is adequate capacity for the cadet staff to conduct their work and implement the recent changes within the arrangements as they currently stand.

---

31 Defence Force Ombudsman, *Submission P28*, p. 1.

32 Air Commodore McDermott*, Committee Hansard*, 21 June 2004, p. 47.

33 The Hon Fran Bailey MP, *Press Release*, '$18 million Boost to Cadets', 11 May 2004. See also, Air Commodore McDermott*, Committee Hansard*, 21 June 2004, p. 56.

Future status and administrative arrangements for the ADFC

14.58 As mentioned above, the case of Cadet Sergeant Tibble also raised the issue of the status of cadet staff and therefore, the accountability of staff. In that case, the adult staff member involved with Eleanore resigned from the organisation leaving no recourse for the TASAIRTC. The committee accepts that had there been grounds for prosecution under criminal or civil law action could have been taken. But, short of such action, accountability and the capacity of the ADFC in relation to its staff has proved limited.

14.59 The committee also accepts the rationale that ADFC staff are largely volunteers who are not preparing for combat and therefore should not be subject to all aspects of the military justice system.[34] The committee, however, is concerned that there are significant numbers of minors under the control and responsibility of people for whom there is no complete legislative framework.

14.60 Whilst there may be a common law employer relationship between the cadet staff and the Commonwealth, in the context of Defence Force Regulations, what that actually entails is enormously vague.[35] The Australian Government Solicitor has advised the ADF that there are issues with the relationship between the ADF and the ADFC and that the regulations (dating back to 1977) should be amended to ensure that the rights and responsibilities of Defence and cadet staff are clearly defined.[36] Air Marshal Houston acknowledged the need to update regulations:

> The problem we have at the moment is that there are deficiencies in the existing arrangements. We have to codify the arrangements in much more detail so that they stand up to close scrutiny. They would not stand up at the moment. There is not sufficient guidance or policy and there are lots of issues with the 1977 legislation, because it essentially established the cadets as a volunteer organisation. We need to put more substance into it so that it stands up.[37]

14.61 In an attempt to address these issues, the committee understands that the Director-General Cadets is developing a submission to the Minister proposing amendments to the regulations. The committee considers resolution of this issue to be vitally important and should be an urgent priority for the Government.

Recommendation 39

14.62 The committee recommends that the ADF take steps immediately to draft and make regulations dealing with the Australian Defence Force Cadets to

---

34 Air Commodore McDermott*, Committee Hansard*, 21 June 2004, p. 54.

35 Air Commodore McDermott*, Committee Hansard*, 21 June 2004, p 55.

36 Air Marshal Houston*, Committee Hansard*, 5 August 2004, p. 76.

37 Air Marshal Houston, *Committee Hansard*, 5 August 2004, p. 77.

ensure that the rights and responsibilities of Defence and cadet staff are clearly defined.

Recommendation 40

14.63 The committee recommends that further resources be allocated to the Australian Defence Force Cadets to provide for an increased number of full-time, fully remunerated administrative positions across all three cadet organisations. These positions could provide a combination of coordinated administrative and complaint handling support.

Chapter 15

Occupational health, safety and support services

15.1 During the course of the inquiry, some witnesses, in recounting their experiences of the military justice system, referred to the adverse effects that these experiences had had on their health. Others spoke of a work place where safe and responsible work practices were not always promoted and which, in some instances, placed the physical or psychological well-being of ADF personnel at risk. This chapter looks at the links that can be made between the military justice system and the health and well-being of those who became involved with it. It also examines the broader issues of the ADF's duty of care, the health services available to ADF personnel and the support offered to the friends and families of serving ADF members who have been seriously injured or have died suddenly.

Features of military service that impact adversely upon mental health

15.2 A number of witnesses to this inquiry attributed the onset or aggravation of health problems, particularly psychological, to the difficulties they encountered with the military justice system. A psychologist, who has worked within the ADF, gave his overall impression of the military justice system and its potential to adversely affect some ADF members:

> One can see that almost every application of the justice system has a human cost, ranging from stress to humiliation to suicidal thoughts and behaviour.
>
> …
>
> I have seen cadets with suicidal thinking held to continue service against their wishes…individuals in utter despair, at risk of self-harm, with no hope of returning to service…
>
> …
>
> The Army and ADF fail to recognise that everybody is there voluntarily. The justice system treats them as if they were indentured servants. To my mind, one of the worst aspects of the application of military justice and regimentation is an invisible one. Fewer and fewer people are wishing to volunteer for it. We cannot fill our places in officer training. Early last century soldiers were being shot for cowardice, as a management tool. Today, that management tool looks barbaric because it is presumed that those who did not comply could be forced to obey, and it paid no notice to the real reasons, to the suffering behind that behaviour. I wonder how our current techniques of behaviour management will look in 100 years time.[1]

15.3 Other witnesses, such as Mr Nigel Southam and Mr Keith Fitzpatrick, made a direct connection between their treatment under the military justice system and

---

1 In Camera *Committee Hansard*, 10 June 2004, p. 65.

problems they experienced including anxiety, severe depression, psychological breakdown and suicidal thoughts and actions.[2]

15.4 The following section looks at specific aspects of the military environment and justice system that may impact upon mental health issues. They include:

- the general reluctance of ADF personnel to report personal health concerns;
- the failure by senior officers to acknowledge or accept reports of problems or difficulties, preventing the commencement of resolution processes;
- defective inquiry and investigation conduct, such as poor record keeping and communication, lack of support, conflicts of interest and breaches of privacy, that may exacerbate or even trigger mental health problems;
- lengthy and delayed military justice procedures that leave individuals feeling isolated, let down or even defeated, and processes that lead individuals to believe that there is no 'justice';
- failure by the ADF to fulfil its duty of care to provide a safe working environment; and
- inadequate mental health reporting and service-delivery.

15.5 Much of the material presented below draws on evidence discussed in previous chapters.

The reluctance to report health risks or concerns

15.6 Evidence presented to this committee suggests that an environment exists in the ADF which makes it difficult for members to seek help.[3] One of the major challenges facing the ADF is to counter the attitude that seeking help is of itself an admission of weakness.

15.7 Other inquiries have noted that the existing military culture can make individuals reluctant to seek help because they believe that this will damage their reputation.[4] This fear of stigma was manifest in written and oral evidence to the current inquiry that detailed a variety of mostly negative attitudes towards mental

2 See chapter 7, paras 7.85–8 and chapter 8, paras 8.109–8.112. Much of this evidence was in camera but see also paras 8.115–8.118.

3 Confidential *Submission C30*, and In Camera *Committee Hansard,* 10 June 2004, p. 66.

4 See Senate Foreign Affairs Defence and Trade References Committee, *Taking Stock*, August 2004. See also *Committee Hansard*, 29 April 2004, p. 6: 'Anyone who has been in the services will tell you that service personnel will cover up medical and personal problems so as not to affect their careers' and also p. 19.

health services and social workers.[5] Colonel Anthony Cotton, Director of Mental Health, Department of Defence, spoke authoritatively on this matter when he stated:

> The help-seeking culture in general—the idea that it is okay to go and get some help—is something that, in my opinion, is foreign to men of our culture. We have seen that in lots of places. I think the military environment exacerbates that because the military environment is all about being robust, being independent and those sorts of things and being able to look out for yourself.
>
> …
>
> The culture makes it difficult for us to do business. We really need a sea change or a significant culture change, because we need people to be prepared to go and seek help. But it is a complex issue, because we need them to be able to admit that they have a problem and seek some help while not diminishing their robustness and resilience. This underpins pretty much everything that we do or is a flavour to what we do. Culture change is a significant thing.[6]

15.8 An ADF psychologist who appeared before the committee stated that the situation is particularly difficult in the ADF because attitudes towards mental health tend to be extreme:

> There is no acknowledgement of the fact that difficulties might be temporary, that it is human to be stressed at certain crisis points in our lives, and that to have a temporary crisis or to seek mental health is a positive thing at certain points in time. There is no acknowledgement of that whatsoever. It is beyond the ability of many of our officers, let alone our soldiers, to make a differentiation between the people who are not coping temporarily and the people who would not cope permanently or would not cope on the battlefield.[7]

15.9 The committee again urges the ADF to acknowledge that the military culture makes it difficult for members to seek help, and to put in place services that take account of and compensate for this weakness. Hotlines and handy 'seek help' cards will not overcome the fear of stigma or ridicule attached to seeking help, nor will they convince ADF members that their concerns will be taken up in a professional manner, treated with respect, and handled in the strictest of confidence.

Failure to treat complaints seriously

15.10 ADF members must have confidence that their requests for assistance will be accepted as legitimate and taken seriously. As noted in previous chapters, this is not

---

5 See *Submission P23*. See also the discussion on this matter in chapter 7 in particular the committee's main findings on the reasons for this reluctance in para. 7.64 and the committee's conclusion in paras 7.83–7.88.

6 *Committee Hansard*, 21 June 2004, p. 4.

7 In camera *Committee Hansard,* 10 June 2004, pp. 66-67.

always the case. The committee heard accounts of senior officers refusing to accept a 'complaint' or dismissing a complaint as 'vexatious' or 'trivial'; the unwillingness of witnesses to become involved in the investigation of a complaint; and the lack of commitment by those responsible for handling a complaint to pursue the matter.

15.11 Refusing to accept complaints in the first instance effectively limits the operation of resolution processes.[8] The Defence Force Ombudsman told the committee:

> We have received several complaints where it appears Defence has had considerable difficulty in entertaining the notion of investigating a complaint in the first instance despite very clear concerns being expressed both by the individuals involved as well as by other people in relatively senior positions in the ADF. It is axiomatic that if a complaint is not accepted as a complaint, it cannot be resolved.[9]

15.12 Failure to accept a complaint can cause on-going emotional stress and thereby affect an individual's mental health. One witness stated:

> If some aggrieved military people do seem obsessive and preoccupied with their complaints, I suggest the reason is mostly because of a long history of military complaint inertia, lack of feedback, perceived lack of compassion, and attitudes similar to that expressed by the ADA, that complainants are cranks. The resultant stress causes many complainants to drop their complaint in despair, and/or suffer nervous disorders. The matters then remain unresolved while the complainant's career evaporates.[10]

15.13 Chief Petty Officer Hyland asserted that he had medical evidence of a physical assault and corroborative evidence that some type of assault had occurred. In spite of this, his case went through several different sets of authorities, including the State police, only to end up in the 'no action' tray. Not only has the assault caused him 'an immense amount of personal distress' but he also feels disappointed by what he perceives as the military justice system's failure to redress wrongdoing. He believes that he has been 'stonewalled at every turn': that there is a 'malignancy of buck passing or serious lack of effective interagency liaison'.[11] He goes on to state:

> I am exasperated at the lack of closure and have contacted the media to try and put more pressure on the Navy to try and gain answers to my situation. This in hindsight may have not been in the best interests of my career,

---

8 See also *Committee Hansard*, 9 June 2004, p. 10.

9 *Submission P28*, p. 4.

10 *Submission P52A*, p. 2, and see also p. 3 'I admit to thoughts ranging from murder to suicide regarding my treatment'; *Submission P61*, p. 5: 'Eventually the victims get out by being discharged as unsuitable or dishonourably, due to the [effect] that events have on their personality and performance, or in the extreme by suicide.'

11 *Submission P15,* p. 1.

however, the emotional turmoil I have undergone may well have clouded my judgement.[12]

Investigation processes as a complicating factor in mental health

15.14 Investigation and inquiry conduct has also had an adverse impact upon many submitters to this inquiry. Both complainants and those complained about have recounted how they were gradually worn down by the stresses and frustrations of inquiry processes.[13] Some submissions noted:

- little information was provided even about the fact that there was an inquiry;[14]
- few opportunities were given to provide evidence;[15]
- absent, incomplete or missing file notes resulted in all the responsibility being placed on the person who believed he/she was the victim, rather than on the alleged aggressor/offender; [16]
- individuals suffered reprisals for complaining or providing evidence leaving members feeling ostracised and without support;[17] and
- lack of confidentiality and privacy breaches during investigations.[18]

15.15 It appears that appeal processes intended to correct defects have, in some cases, also caused or exacerbated mental health problems. Members recall having to battle to obtain relevant documentation to defend their case; non-adherence to procedural fairness; conflicts of interest; intimidation; lack of support; poorly trained investigators; and delays.[19]

15.16 Evidence before this committee concerning the *Westralia* BOI clearly demonstrated how a poorly conducted investigation can contribute to mental health problems, rather than alleviate personal distress after a major incident. Many of those

---

12 *Submission P15,* p. 2.

13 Chapter 8 examined in detailed the flaws in administrative investigations describing in some cases the effects that they have had on individuals. See in particular paras 8.137–8.141.

14 *Submission P63*, p. 3.

15 *Submission P47*.

16 See, for example, *Committee Hansard*, 28 April 2004, pp. 29-30, and *Submission P13A,* p. 2 which states medical information detailing a beating was not placed on a file See *Submission P52*, pp. 2–3 which refers to an event not reported but which left long–term effects on one of the witnesses.

17 See for example statement by Mr Southam: 'These have caused me to be medically discharged as a result of psychological issues, and I have attempted suicide along the way after some three years of trying to find some resolutions in relation to these submissions', *Committee Hansard*, 9 June 2004, p. 64; *Submission P50*, p. 3ff.

18 *Submission P55*, p. 4.

19 See chapter 9 especially paras 9.58–9.61.

affected by the *Westralia* incident felt let down by the subsequent BOI process. To this day, a number of crew members directly involved in the fire—the victims of a terrible accident—are still trying to come to terms with aspects of the inquiry.[20] Some have unresolved anger about the way they were required to provide witness statements so soon after the fire:

> Potential witness[es] were still suffering from grief and shock. We can all appreciate the need to get the evidence whilst it is still fresh in people's minds but some people just wouldn't have been up to it.
>
> …
>
> The day of the memorial service I was required to give my statement, this happened shortly after the service had finished…I was still suffering from shock and disbelief that this accident had actually happened and I was understandably still confused, in a state of distress trying to come to grips with the death of personnel in my charge. The interview lasted about six hours or so and was very disturbing.[21]

Protracted military justice procedures

15.17 Delay and unnecessarily complicated processes involved in the military justice system were identified in several submissions as causing or aggravating mental health problems.[22] The Ombudsman drew the committee's attention to the impact of lengthy delays on an individual's psychological state as an issue progresses through the many stages of complaint resolution, administrative inquiry and/or disciplinary investigation:

> I would note that we do explicitly consider the issue of the impact psychologically on an individual. There is a case we have decided recently to expedite because we believe there is undue psychological pressure on the individual, and we are pressing harder for a more prompt response. In the legislation, we do have the power to intervene even before the 28 days, should there be circumstances that we believe merit that sort of intervention. That really does impose on us the obligation to look at each case on its own merits, rather than with a blanket policy.[23]

15.18 Stress and anguish can result from several factors, including the time taken to convene an inquiry, conduct hearings, consider material, and reach decisions. It is worthwhile to quote again one witness whose sentiments about her family's experiences over seven years encapsulate the feelings of many submitters:

> Our family's psychological and emotional abuse suffered at the hands of the military justice system has been likened to repeated bashings with a baseball bat perpetuated by multiple unknown assailants on multiple

---

20 See chapter 11, paras 11.49–11.52; 11.73–11.77; 11.97–11.99.

21 *Submission P33*, p. 3.

22 See *Submission P41*. Also chapter 6, paras 6.131–6.138.

23 *Committee Hansard*, 9 June 2004, pp. 3, 13.

> occasions—never sure if it was the last bashing… Our journey is a horrific example of the appalling state of the military justice system, highlighting organisational deficiencies, the system barriers, the lack and/or failure to adhere to the relevant policies, processes or procedures. A complete abuse of process that began in 1998 and continued for seven years—a system in total disarray.[24]

15.19 In addition to delayed proceedings, many submitters expressed concerns about defective processes that left them with the impression that justice had not been done. Several witnesses claimed that disciplinary processes reflected imbalances of power inherent in the Defence Force's rank system and tended to favour those of superior rank. One witnesses stated:

> The rank system makes it difficult as well because anyone with a superior rank will automatically be given more credibility than a lower ranking victim.[25]

15.20 Another witness commented that 'even though no other officers agreed with this [person] they all closed ranks and kept their mouth shut'.[26] The committee has also heard evidence that on occasions individuals have been charged without prior warning,[27] and the availability of adequate and competent legal assistance was erratic or non-existent. One witness stated:

> What I believe should be addressed by your committee is the resources the military throw at investigations, as opposed to the lack of advice the member receives.[28]

15.21 The problems with the disciplinary process discussed in this report have important consequences for the mental health and well-being of service members and their families. The stresses placed on individuals under investigation in many cases appear to have had longer term effects, including loss of confidence, loss of employment, suicidal thoughts, attempted and actual suicide. The SAS soldier's case discussed in chapter 3 stands out as a stark example of the extreme, relentless, and unnecessary pressure that can be placed on a member through the conduct of an investigation and pursuit of a prosecution.[29]

15.22 Administrative inquiries have also left families and individuals with the feeling that justice had not been served. The most glaring example of this was the *Westralia* BOI. Family members felt that obstacles such as obtaining access to

---

24 Confidential *Submission C10,* p. 10. Quoted with the permission of Mr and Mrs Hoffman.

25 *Submission P61*, p. 5.

26 *Submission P50*, p. 5. See also *Submission P65*, p. 3.

27 *Submission P50*, p.11; *Submission P53*, pp. 3–4.

28 *Submission P49*, p. 3. See also *Submission P65*, p. 5: 'The next day I faced trial before my Commanding Officer who receives his legal advice from the coxswain, who is also the prosecutor.'

29 See chapter 3, paras 3.29–3.31.

information and the difficulties in attending the BOI suggested that a 'cover up' effort was underway.[30] Many held the perception that the inquiry was conducted in the interests of absolving the Navy of any responsibility or blame for the death of the four sailors:

> I have no doubt the Westralia BOI was nothing more than a navy public relations exercise.
>
> ….
>
> There was a Board of Inquiry rushed into action, before the four deceased sailors were buried. No time or consideration for the families of those deceased, and little information of the inquest was given to the families other than media articles.[31]

15.23 Families also questioned the 'justice' done to the four service members that lost their lives on the *Westralia*:

> The four deceased personnel were never represented at the BOI. The Board members and Council Assisting the Board were accountable directly to the Navy, and that is the way they appear to have run the BOI.
>
> MIDN Megan Pelly, POMT Shaun Smith, LSTM Bradley Meek and ABMT Phillip Carroll had nobody to investigate their actions. None of the Board members or Council Assisting the BOI took any steps to get character analysis or probable action assessments done.
>
> Had anyone been interested in finding out what these brave young sailors may have been doing during the fire, the Board may have come to a different conclusion for their actions as the WA Coroner did (see Coroner's Report, pp. 24-25).
>
> Had the Navy or the BOI panel provided representation for the deceased sailors, it may have avoided the public embarrassment associated with a lengthy drawn out inquiry.[32]

15.24 Dissatisfied families and otherwise affected people pursued the 'justice' they found lacking in the 1998 *Westralia* BOI for a further five years.[33] Having obtained no satisfaction from the military justice system, they eventually gained some sense of justice after successfully lobbying for a coronial inquiry.

Duty of Care

15.25 During the course of the inquiry the committee also became aware that in some cases there was evidence that the ADF had failed to meet its duty of care towards ADF members. The following section looks at ADF's duty to ensure that all

---

30 *Submission P33*.

31 *Submission P30*.

32 *Submission P30*.

33 *Submissions P51, P32,* and *P30.*

personnel are working in an environment that is as safe as it possibly can be with regard to both physical well-being and mental health. The committee considers that the ADF should ensure that precautions are taken to avoid placing service personnel at unnecessary risk of physical or mental harm.

Physical safety

15.26 One factor that became increasingly obvious as this inquiry progressed was the apparent lack of awareness by those in middle management of inappropriate or risky behaviour. Their unawareness or inaction meant that unsafe work practices continued unchecked until an incident requiring investigation shed light on such practices. Unfortunately, in some cases, the incident sparking the investigation involved the death of an ADF member.

15.27 In the case of Private Jeremy Williams, senior officers had failed to implement recommendations from an investigating officer's report completed two years earlier that had exposed improper conduct, including harassment and bullying.[34] According to the investigating officer's report into Jeremy's Williams' suicide, the situation had remained largely unchanged since the first report identified the existence of harmful practices in the unit—senior members in the chain of command had no knowledge that denigration and harassment existed.[35]

15.28 The inquiry into the loss of Seaman Gurr revealed that drinking practices on board his ship, and probably other ships, put personnel at risk. Vice Admiral Chris Ritchie told the committee that people in positions of middle-ranking authority in the ship 'ought to have brought knowledge of that sort of event to the commanding officer's attention but did not…that is where the system of leadership in that ship fell down'.[36] He went on to state:

> I do not accept that there was a culture of illegal drinking on board HMAS *Darwin*. I would accept that there was a culture of illegal drinking amongst a small group, a particular trade category, on HMAS *Darwin*…I certainly do not contend that it was one-off, but I do contend that it was a small subgroup. Indeed, the board of inquiry found that it was not a one-off event and that there had probably been instances before which could have been brought to a head much earlier and were not.
>
> Certain people in that ship did not take those responsibilities seriously enough……

34 See chapter 6, para. 6.30.

35 Annex A, Appointing Officer's Decisions and Action Plan Investigation into the Death of 8299931 PTE J.P.Williams, February 2003, pp. 35–6. This document was provided to the committee and is classified as Staff-in-Confidence. The committee has taken great care to ensure that the privacy of any persons referred to in the report has been respected.

36 *Committee Hansard*, 1 March 2004, p. 22.

> I am not convinced it is a problem that is limited to HMAS *Darwin*. If it was in HMAS *Darwin*, there probably were subcultures in other places.[37]

15.29 The investigation following the death of Corporal Jason Sturgess in a vehicle accident also exposed unsafe and dangerous work practices. Although factors such as poor vehicle maintenance were not found responsible for the accident, the fact that these practices and such a lax attitude to safety matters prevailed is of concern. According to Jason's uncle, Mr Jonathan Ford, who had some experience in safety investigations and audits,[38] the report on Jason's death referred to unserviceable brakes, inadequate record procedures and other deficiencies. The were also questions about the safety of vehicle seat belts.[39] Jason's Aunt, Ms Coral Giffen, expressed the view that:

> Being in the ADF should not mean that there is an unacceptable death rate from accidents or failure of equipment. If anything, under peacetime circumstances, under normal circumstances, because of the very job that we ask them to do when we ship them overseas, when we deploy them, we should be even more respectful of the need to keep them safe when they are not at home. How awful to think that our young people may find that the worst enemy that they face in their career in the defence forces is actually their own government, their own command and the people who vote those people in.[40]

15.30 The examples given here are not isolated cases. They demonstrate that all three services have at times failed to provide a safe work environment for personnel, and highlight the need for the ADF to have mechanisms in place that will enable the early detection of unsafe work practices. The cases discussed so far relate to physical safety concerns. Numerous witnesses have also related accounts of where they believe the ADF was remiss in not taking account of emotional and mental health needs.

Mental Health

15.31 Evidence of people's experiences in the military and encounters with the military justice system suggest that the ADF may also not adequately meet its duty of care in relation to mental health.

15.32 The case of Lance Corporal Nicholas Shiels serves as a stark reminder that the ADF, on occasion, has not adequately considered the mental health of those under its charge. Nicholas was involved in a live firing exercise in which he accidentally shot

---

37 *Committee Hansard*, 1 March 2004, pp. 22–3.

38 Mr Ford indicated during evidence on 22 April that he had worked in the mining, oil and gas industries and had been an Air Force member. He had undertaken safety investigations and audits, and had experience in reporting to statutory authorities. *Committee Hansard*, 22 April 2004, p. 18.

39 *Committee Hansard*, 22 April 2004, p. 26.

40 *Committee Hansard*, 22 April 2004, p. 19.

and killed a fellow soldier.[41] Mr Paul Sheils, Nicholas' father maintained that, from this moment on, Army abrogated its duty of care towards a severely traumatised young man who was in total disbelief and trying desperately to rationalise the tragic circumstances that had occurred. He told the committee:

> We want to emphasise the major factors in Nicholas's demise as being the failure to diagnose PTSD, the abysmal lack of follow-up medical treatment, poor or flawed man management by superiors and, in particular, the appalling negligence of Army psychologists, all of which ultimately contributed to his death.[42]
>
> …
>
> The Army failed to look after Nicholas in his work environment during peacetime training. Comcare found that the Army contravened 24 areas of its duty of care under the occupational health and safety act. No senior officer was court-martialled for this. Why not? In the initial aftermath of the accident it was crucial that Nicholas be given support and counselling commensurate with his trauma. Because he did not receive this, he commenced a downward spiral that resulted in his death. There is an implicit comparison between the treatment normally available to civilians and that which was given to our son. It is not up to us to prove that the Army failed in its duty of care for our son: it is indisputable. The evidence is clearly outlined in the Comcare report, the coronial inquest findings and ultimately in his death.[43]

15.33 One of the most disturbing aspects of this case was Nicholas' participation in another live firing exercise soon after the accident. Mr Shiels told the committee that, despite his heavily traumatised state, Nicholas was not placed on sick leave, nor did he receive proper medical treatment immediately following the tragedy. Mr Sheils claims that his son was instead 'instructed to undertake the same "live firing" exercise two days after the death of his colleague.'[44] Mr Shiels told the committee:

> In our presence he was told, not asked, to undertake the same live firing exercise just two days after the accident—the instigator being the on-scene Army psychologist.
>
> You must remember that here we have a young private—bottom of the rung—involved in an accident, the consequences of which were that his mate was killed. Army hierarchy were in damage control. He relived the accident over and over, with questions and statements from both Army and state police. As a private you are powerless and subject to the Defence Force Discipline Act. He was not in a position to refuse an order. We were absolutely staggered. However, we knew that we had absolutely no say. We expressed our reservations because of his already fragile state. We saw

41 *Submission P23*, p. 1.

42 *Committee Hansard*, 29 April 2004, p. 3.

43 *Committee Hansard*, 29 April 2004, pp. 3–6.

44 *Submission P23,* p. 1.

> Nicholas pressured to undertake the same live firing exercise again. The handling of the situation emphasised the outmoded idea: if you fall off your horse, get back on it and get over it.[45]

15.34 He stated further that, before the second live fire exercise, Nicholas was put in front of the 200 troops who were asked 'who will volunteer to be Private Shiels's partner?' Not only did the actions or lack of action by the Army add to this young man's suffering, but the military justice system further contributed to his distress. Nicholas was discharged from the Army in February 1995, having served just under three years. He attempted suicide on 29 December 1996 and died on 31 December 1996.

15.35 The sequence of events after the *Westralia* accident followed a similar pattern. Again, those in charge failed to appreciate the severe trauma suffered by those involved in the accident. Where mental health care was provided in the immediate aftermath of the *Westralia* tragedy, witnesses have told the committee that it was inappropriate. Personnel who had been on the Westralia at the time of the fire were given 'group therapy' sessions by the critical incident stress management team. Personnel found these sessions incredibly stressful, traumatic and unproductive. Mr Gary Jenkins stated:

> At the briefing the psychologists tried to get everybody to talk about what they did on the ship that day but I couldn't talk about it and started to get very emotional and annoyed. Some of the crew were starting to ask questions about the way we did things, and why we had sent the hose team back in, what was Midshipman Pelly doing in the room and so on. I felt that I couldn't answer them at this stage and walked out. This major disaster briefing was a joke. It didn't help in any way, in fact it made things worse for me.[46]

15.36 Aside from the inappropriate mental health care delivered immediately after the incident, witnesses have also told the committee that their ongoing mental health care needs were inadequately provided for. One witness stated that Navy had been advised that she required further psychiatric treatment. This information, however, was not given to her. She informed the committee that:

> I have proof of gross negligence on [the part of] the Navy, who received a report from a Psychiatrist stating I had PTSD from the fire and needed counselling every two weeks, and also anti-depressants but the Navy kept that letter to themselves and this advice went unknown to me until I found the letter on my medical file when I was discharged.[47]

---

45 *Committee Hansard*, 29 April 2004, p. 4.

46 *Submission P45*, p. 2.

47 *Submission P37*, p. 4.

15.37 Another victim of the *Westralia* fire, Able Seaman Matthew Liddell, received some psychiatric care but it appears to have been insufficient to deal with his PTSD.[48] His mother, Ms Dulcie Liddell, told the committee that Matthew had attempted to revive a badly burnt crew member. As a direct result of his experiences following the fire he suffered PTSD, and eventually took his own life. Mrs Liddell told the committee:

> Matthew was hospitalised in St John of God for a few days, then transferred back to HMAS 'Stirling' medical facility. After discharge about a week or so later he was then sent back to HMAS 'Westralia' which was in my opinion very wrong, this did a lot of damage to his mind—it is a lot like sending someone back into the lion's den after they're been already attacked and mauled. Matthew did not want to go back to the 'Westralia'. There were too many traumatic memories, he couldn't cope with emotionally which resulted in bad nightmares, a great loss of sleep, which consequently resulted in a high degree of irritability and anxiety. Even though he'd had counselling on a few occasions, this did nothing to alleviate his problems, maybe his treatment was not taken seriously enough.
>
> Just before Xmas of 1998, Matthew was hospitalised with severe depression, this should have been a warning and to have something constructive done—The Navy then decided for 'the purposes of maintaining his mental health he could not stay on the 'Westralia', it only took them months to come to this obvious conclusion.[49]

15.38 Ms Liddell explained further:

> The assessment team of psychiatrists, social workers and psychologists who follow the Guidelines of the National Centre for War Related P.T.S.D. found Matthew qualified for admission to the P.T.S.D. treatment program. This programme commenced 24-9-99. This is 16–17 months after the 'Westralia' disaster. Why so long?[50]

15.39 The committee notes that Navy has acknowledged that it lacked a good understanding of PTSD, but has expressed its willingness, and taken action, to obtain a better insight into the condition.[51]

15.40 Jason Gutteridge's case is an example where Army failed to manage a soldier's obvious mental health difficulties. Mrs Debra Knight, Jason's mother, told the committee that Jason had been in a military prison and had attempted suicide twice

---

48 *Submission P13*, pp. 2–3. Information on Able Seaman Matthew Liddell varies, with the Navy stating that extensive care was provided, including after discharge (*Submission* 16B, p. 2) and his mother believing that he was not admitted to specialised treatment for PTSD until 16 months after the fire (*Submission* P13, p.5) as well as not being able to move away from Perth to avoid the memory of the fire.

49 *Submission P13,* pp.1–2.

50 *Submission P13,* p. 4.

51 *Committee Hansard*, 5 August 2004, p. 38.

over a short period immediately preceding his death. Despite these attempts at suicide, Mrs Knight was never informed about Jason's difficulties. The evidence before the committee suggests that Jason's friends assumed most of the responsibility for Jason's care.[52] Mrs Knight only discovered, some months after his death, that he had been experiencing emotional difficulty and had made two previous attempts at suicide.[53]

15.41 Mr Keith Showler, a Flight Sergeant with the RAAF, told the committee that after continued harassment and abuse from an Army Major, he suffered a 'nervous breakdown'. Mr Showler received immediate medical attention but could not continue receiving mental health care because adequate records detailing the initial treatment were not made.[54] He had to access ongoing psychiatric care at his own cost. In this instance, not only did the ADF fail in its duty of care to provide an environment where the risk of mental health difficulties was reduced, but it further failed to provide adequately for Mr Showler's mental health needs after the initial incident.

15.42 These varied experiences—from Navy, Army and Air Force—all demonstrate that shortcomings in mental health care are not confined to a particular service. They are common to all three. There seems to be a broad-based failure within the ADF to adequately meet the duty of care owed to Service personnel.

Managing mental health reporting and service provision

15.43 In addition to receiving evidence from submitters concerning their experiences, the committee heard from the ADF regarding its management of mental health issues, including reporting mechanisms and support service provision.

Reporting mental ill-health

15.44 Mental health issues seem to be under reported in the ADF. The problem may actually be much larger than the evidence to this inquiry, or the records kept by the ADF, suggest. The committee has already discussed a general reluctance within the ADF to report wrongdoing or lodge complaints. In para. 15.5 the committee asserted that this reluctance may extend to and impact upon an individual's ability to identify and seek help for mental health needs. The committee considers, however, there are also shortcomings in the way that the ADF records mental health data and assesses the performance of its mental health programmes.

15.45 The ADF acknowledges that it is operating in something of a vacuum regarding mental health services because it has no prevalence data. Colonel Cotton told the committee:

> It is going to be difficult for us to get any real measure of the effectiveness that we have had in reducing the incidence of mental ill-health in the ADF

52 *Submission P18* and *Committee Hansard* pp. 32–33.

53 *Submission P18.*

54 *Submission P3*, p. 2.

> because we have no prevalence data. We do not know what the current rates are
>
> …
>
> We will get a prevalence study up and running probably next year, which will give us some benchmark data that we can then use for a subsequent evaluation, probably a couple of years on from that. The simple fact is that we do not have good data on prevalence rates at the moment to do comparisons.[55]

15.46 A committee member asked whether there was any data at all that could be used to benchmark the state of mental health in the armed forces. Colonel Cotton replied that these things could be done, but the effort involved in retrieving data from paper records would be enormous. He stated:

> Defence Health is starting a process of routine health studies for every deployment and that has a mental health component. But the simple fact is that we do not have the electronic information systems to do that easily.[56]

15.47 The committee does not accept that an armed force with a budget running into billions, access to some of the most technologically advanced weapon systems in the region, and the sophisticated software to manage these, does not have an electronic information system sufficiently advanced to maintain adequate mental health records and service provision.

15.48 In the absence of service-specific data, the ADF expects to monitor the outcomes of its mental health strategies using information from the federal government's National Mental Health Strategy.[57] The ADF would therefore appear to be relying on broad-based, nation-wide 'whole of government' mental health indicators to assess the success or otherwise of its own specific programmes.

15.49 The committee questioned Colonel Cotton regarding suicide rates in the armed forces. He confirmed that suicide rates have at times exceeded the rates in the general population. A committee member asked Colonel Cotton whether it was appropriate to compare the ADF against the general population, given that the issue did not involve the general community *per se*, but rather, involved a single employer. Colonel Cotton replied that the ADF does not generally tend to examine its statistics against other employers, but acknowledged 'it would be interesting and useful to do that'.[58]

15.50 The committee considers that the ADF needs to improve its reporting and management systems. It should not measure its performance against the general population, but rather, should act swiftly to develop adequate reporting and mental

---

55 *Committee Hansard*, 21 June 2004, p. 21.

56 *Committee Hansard*, 21 June 2004, p. 21.

57 *Committee Hansard*, 21 June 2004, p. 21.

58 *Committee Hansard*, 6 August 2004, p. 39.

health management systems that are adapted and appropriate to its specific circumstance.

Providing mental health services

15.51 Colonel Cotton informed the committee that the ADF is in the process of upgrading and enhancing its mental health service provision, and was generally adopting a more proactive approach:

> The ADF mental health strategy represents a major change in direction for the delivery of mental health care to the ADF. It is based on the Australian national mental health policy and uses a public health model of mental health service delivery. This means that it is focused on health promotion and preventing mental ill health rather than simply responding to ADF members who become unwell. This does not mean that we do not provide treatment to individuals who become unwell, but we are putting a lot more effort into stopping individuals getting to that point.[59]

15.52 In referring to gradual changes that have been implemented or developed for the provision of mental health care, General Cosgrove noted:

> In the past few years the ADF has significantly improved the mental health care provided to its members. We have a mental health strategy that integrates the efforts of personnel in health, psychology, social work and chaplaincy in the ADF to better meet the needs of our people and commanders. Considerable efforts have been made to address alcohol and other drug issues, to enhance our ability to respond to suicide related behaviour and in how we deal with the potentially traumatising effects of military service. We have put substantial resources into training ADF health and allied health staff to provide care to ADF members. In most areas, the level of care substantially exceeds what is provided in the general community.[60]

15.53 The ADF has a process of information development and service provision, and also produces and disseminates material to raise awareness of the services it provides. The ADF has produced material on PTSD, mental health generally, and on the links between mental health and substance abuse. While these are very important, help to increase the awareness of mental health, and recognise that mental health difficulties are common reactions to a range of issues, there also needs to be an awareness that the responsibility of the individual and his or her colleagues is limited. It is vital that the ADF adopts a pro-active stance towards mental health service delivery and develops the infrastructure required to adequately provide for the needs of service personnel.

15.54 The ADF informed the committee about a hotline ADF personnel can access to discuss problems and obtain referrals to services:

---

59 *Committee Hansard*, 21 June 2004, p. 3.

60 *Committee Hansard*, 6 August 2004, p. 39.

> The purpose of the all-hours support line is not to provide a telephone counselling service or anything like that; it is to provide access for someone in crisis to ADF provided facilities. What they will do is that if someone calls and they are in crisis now they will be put onto the 24-hour support that is available in their region but the people at the end of the line, who are all trained health or allied health professionals, will make an assessment and if that person can be best dealt with the next day they will refer them the next day.[61]

15.55 According to Colonel Cotton, Service personnel are not, however, readily accessing this phone service.[62] Several factors could explain this, including the fact that, regardless of being able to speak to someone outside the ADF during times of crisis, individuals are subsequently referred to ADF-provided services. The committee has previously postulated that individuals may be unwilling to access ADF-provided services due to cultural factors and fear that this may adversely impact on career prospects. Personnel's willingness to access services like mental health hotlines will not improve until a cultural shift occurs in the ADF, and personnel begin to accept that penalties or stigma will not and should not occur when mental health services are accessed.[63]

Services to families and support to next of kin

15.56 The committee has received evidence concerning the way families have been treated while matters have progressed through the military justice system, and has also considered the provision of support services to grieving families and families otherwise encountering difficulty.

15.57 The ADF has introduced a number of processes to assist personnel and families to cope with ordeals such as accidental death and suicide. A number of these have been operating for some time, and others have been set up in response to particular reports. They include:

- the introduction of the 'sudden death protocol';
- providing assistance for families to provide input into inquiries; and
- providing support teams, including chaplains and social workers to help families when a death has occurred, and liaison officers who can take

---

61 *Committee Hansard,* 21 June 2004, p. 4.

62 *Committee Hansard,* 21 June 2004, pp. 9, 13. He stated it was 'undersubscribed' and he thought it 'would get used more'.

63 *Committee Hansard,* 21 June 2004, p. 3: 'When we set the line up, one of the key things was to provide some anonymity because we have this strong sense that people do not use resources because of the spectre of it affecting their career'.

> care of and co-ordinate services, thus minimising a family's need to be involved in details.[64]

15.58 The Service Chiefs have also often had contact with families during times of tragedy. Much of the ADF's contact with families, however, is organised through the Defence Community Organisation (DCO):

> Members of ADF families can approach DCO officers directly in order to obtain assistance or any ADF member can obtain access to the DCO as he or she requires. However, in times of crisis or tragedy involving a serving member, it is usually the ADF chain of command which activates the DCO to assist a family.[65]

15.59 Rear Admiral Brian Adams, head of Defence Personnel Executive, told the committee that DCO staff partner with medical, psychology and chaplaincy providers within the ADF to provide critical incident mental health support services and counselling to people affected by a loss—including deceased member's colleagues and families. The DCO may also engage independent external professional providers if caseworkers feel that it is in a family's interests to do so and the family is agreeable to it.[66] Rear Admiral Adams stated:

> The DCO ensures a system of support is built around the family from within the wider community to support the longer term recovery and support needs of the family.[67]

15.60 Mr Bernard Collaery, a lawyer who has assisted many families through the military justice system, nonetheless advised that the process left some gaps in information and support which could contribute to long term issues. He told the committee:

> The other people who do not get the critical incident debriefing and proper treatment are the relatives, who, sometimes by perception—wrong, right or otherwise—become absolute thorns in the side of the government and military people, sometimes when issues could be put down straightaway.[68]

15.61 Responses to ADF support services have varied. This variability may have been the result of process changes over time, and of differences in the attitudes of the forces. Mr Collaery praised the 'current Chief of Air Force' whom he described as

---

64 *Committee Hansard*, 2 August 2004, p. 2: 'The [military support] officer is responsible, along with people such as the chaplain, for organising a funeral in the case of a death, assisting with managing the estate and providing a conduit between the member's unit and the family to ensure information is communicated clearly, accurately and in a timely manner. The DCO also allocates a social worker to the family who, in the early stages, assists the family.'

65 *Committee Hansard*, 2 August 2004, p. 1.

66 *Committee Hansard,* 2 August 2004, p. 9.

67 *Committee Hansard*, 2 August 2004, p. 2.

68 *Committee Hansard*, 9 June 2004, p. 56.

'just an exemplary man in the way he deals with issues. I have great admiration for him':

> Whilst I am very critical of the Air Force over the F111, his ability to send notes to the families on the anniversaries of the deaths of his operational crew just marks the man. That process has to be led and that man is leading that in that arm.[69]

15.62 Ms Gurr, mother of the sailor lost at sea in 2002, found the support she received was excellent. On the other hand, Mrs Liddell was critical of the DCO:

> The DCO from Mitchelton dropped off pamphlets at my daughter Michelle's house in Keppera. There was no conversation, no talking about it; nothing was explained.[70]

15.63 Mrs Satatas, mother of a young man alleged to have committed suicide in 2003, also considered that the help she received was inadequate.[71] The mother of a pilot killed in 1993 expressed similar concerns, stating that there had been no assistance in getting to the funeral, and no counselling provided.[72] While there have been improvements since 1993, other factors still appear to limit the provision, and quality, of services to some people.

15.64 The Committee notes and welcomes the initiatives taken by the ADF to improve its health services for serving ADF members and the support services its provides for families of serving members who have been injured or died suddenly. Evidence shows that this is an area that needs the ADF's close attention.

Conclusion

15.65 The report could go on to describe in detail aspects of the delivery of mental health services in the ADF but this would go further beyond the terms of reference. The committee concludes this chapter by emphasising that the military justice system should be a mechanism that not only deals with wrongdoing but is instrumental in preventing wrongdoing from occurring. It should be a means of stopping the emergence or continuation of conduct that puts the well-being of individual members at risk. Its procedures should not add to the ordeal experienced by people who are caught up in the process. The military justice system should not be part of the problem, it should be part of the solution— it should resolve problems, not create them.

---

69 *Committee Hansard*, 9 June 2004, p. 57.

70 *Committee Hansard*, 22 April 2004, p. 49.

71 *Submission P2*; *Committee Hansard*, 2 August 2004, p. 12. See also *Submission P13*, p. 5 which was highly critical of the DCO although more positive about help provided by chaplains.

72 *Submission P32*, p. 5.

15.66 The committee draws attention to the evidence that highlights the shortcomings in the military justice system and how such failings have contributed to or caused mental heath problems. This awareness alone should convince the ADF of the need to put in place the recommendations made by this Committee to reform the military justice system.

15.67 The recommendations contained in this report are intended to remove some of the systemic problems that cause Service members unnecessary stress and anxiety. The committee hopes that implementation of the suggested reforms will encourage ADF members to report wrongdoing or make a complaint, and will promote the attainment of impartial, rigorous and fair outcomes. The committee hopes that a reformed military justice system will enable those who feel unable to pursue a matter through the chain of command to seek redress through independent and impartial bodies.

15.68 An independent body created to correct administrative defects and an independent military court will perform important oversight functions, ensuring that investigators are better trained, that inquiries and investigations observe the principles of procedural fairness, and that delays are kept to a minimum. These bodies will be in a better position to take account of the needs and well-being of those caught up in the military justice system.

15.69 Furthermore, by expanding the involvement of civilian police and courts in areas where they have the expertise and structures to better handle such matters, and creating a court that reflects principles enshrined in the Commonwealth Constitution, ADF members can expect to enjoy the same rights and have the same safeguards as all Australians. Overall, the recommendations are designed to put in place for ADF members a justice system that will provide impartial, rigorous and fair outcomes and one that is transparent and accountable.

SENATOR STEVE HUTCHINS
CHAIRMAN

Appendix 1

Public submissions

P1	Ms Marlene Delzoppo
P2	Ms Joan Gurr
P3	Mr Keith Showler
P4	LCDR Brian Sankey
P5	Mr Allan Warren
P5A	Mr Allen Warren
P5B	Mr Allen Warren
P5C	Mr Allen Warren
P5D	Mr Allen Warren
P5E	Mr Allen Warren
P6	Mr Robert and Mrs Patricia Amos
P7	Mr Peter Gerrey
P8	Mr Mark Drummond
P9	Ms Rosa Satatas
P9A	Ms Rosa Satatas
P10	Ms Madonna Palmer
P11	Mr Nigel Danson
P12	Mr Michael Pembroke Prowse
P13	Mrs Dulcie Liddell
P13A	Mrs Dulcie Liddell
P14	Mrs Yvonne Sturgess
P15	Mr John Hyland
P16	General P.J. Cosgrove AC MC
P16A	Vice Admiral Chris Ritchie AO
P16B	Vice Admiral Chris Ritchie AO; Air Commodore Simon Harvey
P16C	Lieutenant General P F Leahy AO
P16D	Confidential
P16E	Vice Admiral Chris Ritchie AO
P16F	General P.J. Cosgrove AC MC
P16G	Air Commodore Simon Harvey
P16H	Confidential
P16I	Vice Admiral Chris Ritchie AO
P17	Mr Charles & Mrs Jan Williams
P17A	Mr Charles & Mrs Jan Williams
P18	Ms Debra Knight
P19	Mr Nigel Southam
P20	Mr J G Clark
P21	Ms Avril Andrew
P21A	Ms Avril Andrew
P22	Mr Bernard Collaery
P23	Mr Paul Shiels
P24	Ms Jan Allen
P25	Group Captain Anthony Behm

P26	Mr Victor Meek
P27	The Hon Justice L W Roberts–Smith
P28	Prof John McMillan
P29	Ms Victoria Anne Dalglish
P30	Mr Lyndon Pelly
P31	Ms Janet Screaton
P32	Ms Jan McNess
P33	Mr Kevin David Herridge
P34	Mr Douglas McDonald
P35	Ms Jayne Fitzpatrick
P36	Mr Lloyd Richards
P37	Ms Melissa Munday
P38	Mr David Richards
P39	Mr Neil James
P40	Mr Russ Miller
P41	Mr Dean Wirth
P42	Mr Paul Copeland
P43	Mr Terence Collins
P44	Bishop M Davis
P45	Mr Gary Wayne Jenkins
P46	Mr Samuel Golledge
P47	Mr Tony Spek
P48	Ms Susan Campbell
P49	Mr Peter A H Simpson
P50	Mr Peter Le Plastrier
P51	Captain G D Mackelmann SC
P52	Mr David Hartshorn
P52A	Mr David Hartshorn
P53	Major W E Farmer
P54	Mr Neil Howard
P55	Mr Geoff Lewis
P56	Group Captain (Rtd) Philip Morrall AM, CSC
P57	Captain Peter Callaghan SC RANR
P58	Ms Jennifer Mackenzie
P59	Mr George Heron
P60	Mr Peter Benson
P61	Mr David Down
P62	Brigadier C.J. Anstey
P63	Mr Peter Dolheguy
P64	Colonel John A. Harvey
P65	Leading Seaman Darren Saxby
P66	Mr and Mrs A Hayward
P67	Mr Steve & Mrs Cathy Neuhaus
P68	Mr Laurence Mahony
P69	Mr Adam Johnson
P70	Mr Ernst Willheim
P70A	Mr Ernst Willheim
P71	Mr Peter Goon

Appendix 2

Additional information, tabled documents, and answers to questions on notice

Additional information

- "A Study into Judicial System under the Defence Force Discipline Act" by Brigadier the Hon A.R. Abadee, RFD Deputy Judge Advocate General, *1997*
- "Own motion investigation into how the Australian Defence Force responds to allegations of serious incidents and offences – Review of Practices and Procedures" Report of the Commonwealth Defence Force Ombudsman, *January 1998*
- Report of the BOI into HMAS Westralia, *August 1998*
- "Inquiry into Military Justice in the Australian Defence Force" Report by Mr J.C.S. Burchett QC, an investigating officer appointed by the CDF under Defence (Inquiry) Regulations 1985*, July 2001*
- "The Defence Legal Service Board of Inquiry Management Audit" Report by Acumen Alliance, *October 2003*
- Coroner's Report into HMAS Westralia, *December 2003*
- Executive summary of Investigating Officer's Report into the Death of PTE Jeremy Williams (modified for public release), *2003*
- Australian Defence Force: Appendices to ADF submission P16, *19 February 2004,* in 3 volumes.
  Annex F appendix 1:

1. ADF Publication 06.1.3: The Guide to Administrative Decision Making
2. ADF Publication 06.1.4 : Administrative Inquiries Manual
3. Defence Instruction (General) Personnel 34-1: Redress of Grievance – tri-service procedures
4. Defence Instruction (General) Personnel 35-6: Formal warning and censures in the ADF
5. Defence Instruction (General) Personnel 45-1: Jurisdiction under the Defence Force Discipline Act – guidance for military commanders
6. Defence Instruction (General) Administration 45-2: Reporting and investigation of alleged offences within the Australian Defence Organisation
7. Defence Instruction (General) Personnel 45-4: ADF prosecution policy
8. Defence Instruction (General) Personnel 45-6: Director of Military Prosecutions – interim implementation arrangements
9. Defence Instruction (General) Administration 61-1: Inspector General of the ADF – role, function and responsibilities

Annex F appendix 2:

A. Illegal drugs and testing policies

1. Defence Act 1903 Part VIII: Urinalysis testing of members of the Defence Force who undertake combat-related duties
2. Defence Instruction (General) Personnel 15-2: Involvement by members of the ADF with illegal drugs
3. Defence Instruction (Navy) Personnel 13-1: Illegal use of drugs and drug education in the Royal Australian Navy

4. Defence Instruction (Army) Personnel 66-5: Army's random and targeted urinalysis drug testing program
5. Defence Instruction (Air Force) Personnel 4-26: Illicit drug testing in the Air Force

B. Alcohol abuse and testing policies

6. Defence Instruction (General) Personnel 15-1: Misuse of alcohol in the Defence Force
7. Defence Instruction (Navy) Personnel 31-9: Management of alcohol and the prevention and management of alcohol abuse in the Royal Australian Navy
8. Defence Instruction (Army) Personnel 66-1: Alcohol use and the management of alcohol misuse in the Army
9. Chief of Air Force Directive 04/03: Implementation of the Air Force interim random and targeted urinalysis testing program
10. Defence Instruction (General) Personnel 15-4: Alcohol testing in the ADF
11. Defence Instruction (Navy) Personnel 31-51: Alcohol testing in the Royal Australian Navy
12. Defence Instruction (Air Force) Personnel 4-25: Alcohol testing in Air Force
13. ADF Mental Health Strategy – Alcohol (Fact Sheet)

C. Policy relating to accidental deaths and suicides

14. Defence Safety Manual (SAFETYMAN) volumes 1 and 2
15. Defence Instruction (General) Personnel 11-2: Notification of service and non-ADF casualties
16. Defence Instruction (General) Personnel 20-6: Deaths within and outside Australia of Australian Defence personnel
17. Health Policy Directive 209: Suicide - Management of suicide attempts and gestures by ADF personnel
18. Defence Instruction (Navy) Personnel 5-2: Casualties – Injuries, Deaths, Boards of Inquiry, Inquests and Post-Mortems
19. Defence Instruction (Navy) Personnel 40-5: Management of threatened, attempted or completed suicide within the RAN
20. Chief of Army Directive 14/03: The administration of incidents of sudden death
21. ADF Mental Health Strategy – Suicide (Fact Sheet)
22. ADF Mental Health Strategy – Post-traumatic stress disorder (Fact Sheet)

D. Other policy issues

23. Defence Instruction (General) Personnel 34-4: Use and management of alternative dispute resolution in Defence
24. Defence Instruction (General) Personnel 35-5: Discrimination, harassment, sexual offences, fraternisation and other unacceptable behaviour in the ADF
25. The ADF Mental Health Strategy (Pamphlet)
26. A Guide for Commanders – ADF Mental Health Strategy (Pamphlet)
27. Serving in Australia's Navy, 2003 (Booklet)
28. Divisional Staff Handbook – Serving in Australia's Navy, 2003 (Booklet)

- Australian Defence Force: Attachments to ADF submission P16, *19 February 2004,* Military Justice Procedures in 2 volumes:
  Volume 1: Discipline Law Manual (ADFP 201) *April 2001*
  Volume 2: Defence Force Discipline Act 1982 prepared on 14 January 2004 taking into account amendments up to Act No. 135 of 2003

Defence Force Discipline Rules 1985 prepared on 25 February 2002 taking into account amendments up to SR 2002 No.24
Defence Force Discipline Regulations 1985 prepared on 24 December 2003 taking into account amendments up to SR 2002 No.7 and Act No. 135 of 2003

- The Winston Churchill Memorial Trust of Australia Report "An Overview of Support Strategies for Australian Defence Force Bereaved Families" by Kristin Ferguson *March 2004*
- Judgement of the High Court of Australia: Re Colonel Aird; Ex parte Alpert [2004] HCA 44 *9 September 2004*
- Judgement of Justice Crispin in the ACT Supreme Court: Russell Vance v Air Marshall Errol John McCormack in his capacity as Chief of Air Force and The Commonwealth [2004] ACTSC 78 *2 September 2004*
- Department of Defence, *13 April 2005* – details of staffing levels in the office of the Director of Military Prosecutions.
- Mr David Hartshorn *email of 4 April 2005* – received feedback to his public submissions 52 and 52A
- "Review of the ADF Redress of Grievance System 2004" A joint report by the Department of Defence and the Office of the Commonwealth Ombudsman, *27 January 2005.* Received 21 April 2005.

Tabled documents

Michael Griffin	Issues Paper, Senate Inquiry into the Effectiveness of the Military Justice System, Paper commissioned by the Senate Foreign Affairs, Defence and Trade References Committee

1 March 2004 Canberra

Chief of Navy	Acting Leading Seaman Gurr BOI recommendations – Executive Summary
Chief of Army	Fair Go Hotline - Answer to question on notice 1 March 2004 by Senator Johnston

21 April 2004 Hobart

Mrs Susan Campbell	Photograph of Eleanore Tibble receiving a trophy from the Lord Mayor of Hobart for singing at Eisteddfod
Mrs Susan Campbell	Letter from Air Marshall Houston to Mrs Susan Campbell dated 6/4/04
Miss Melissa Munday	Statement made to BOI and changes made by naval lawyer

9 June 2004 Canberra

Mr Grant Clark	Directive from Director General The Defence Legal Service—Support to Boards of Inquiry dated 16/07/03

2 August 2004 Canberra

CAPT Helen Marks	Leaflet: Information for participants of ADR
CAPT Helen Marks	Leaflet: A workplace dispute? Try ADR

CAPT Helen Marks	Leaflet: Alternative Dispute Resolution ADR is fast, flexible and fair

6 August 2004 Canberra

COL Ian Westwood	Table of combined figures for number of people committing offences overseas
COL Ian Westwood	Table of offences committed overseas: IRAQ and East Timor
COL Ian Westwood	Table of offences committed overseas
COL Ian Westwood	Table of offences committed overseas – not IRAQ or East Timor
COL Ian Westwood	Duty statement for the position of Chief Judge Advocate

Answers to questions on notice

Hearing date

1 March 2004 — Dept of Defence dated 29 April 2004 – Answers to 10 questions on notice relating to:

1. Rate of prosecutions in Army compared to other Services
2. Air Force Inquiry report into the suspension of CSGT Eleanore Tibble
   - Attachment 1: Inquiry into the administrative processes and procedures surrounding the suspension of CSGT Eleanore Tibble G1465 – Investigating Officer's report *May 2001*
3. Control of volunteer staff in the Cadets
4. Remuneration of volunteer staff in the Cadets
5. Nature of prosecutions under General and Restricted Courts Martial and Defence Force Magistrates
   - Attachment 2: JAG report for 1998
   - Attachment 3: JAG report for 1999
   - Attachment 4: JAG report for 2000
   - Attachment 5: JAG report for 2001
   - Attachment 6: JAG report for 2002
   - Attachment 7: Defence Force Discipline Rules 1985 – Schedule of Offences – valid prior to 15 Dec 2001
   - Attachment 8: Defence Force Discipline Rules 1985 – Schedule of Offences – valid from 15 Dec 2001 to the present
6. Handling of Defence responses to other witnesses' evidence
7. Composition of Defence Taskforce and resources allocated
8. Defence legal resources
9. People involved in the Military Justice system
10. Handling of questions on notice

9 June 2004 — Defence Force Ombudsman dated 2 August 2004 – Answers to 5 questions on notice relating to:

1. Establishment of an independent agency to conduct investigations
2. Enhanced role for CRA
3. Streamlining of complaints processes available to ADF personnel
4. Ombudsman recommendations to ADF
5. DFO initiation of an 'own motion' investigation

21 June 2004 — Dept of Defence dated 30 July 2004 – Answers to 4 questions on notice relating to:

1. ADF mental health screening
   - Attachment 1: Health Bulletin No.9/2003
2. Granting of leave on medical grounds
3. Training for officers in suicide prevention
4. Cadet enhancement program

2 August 2004 — Dept of Defence dated 3 September 2004 (also sent on 1 November 2004) – Answers to 4 questions on notice relating to:

1. Defence Community Organisation – standard operating procedures
   - Attachment 1: Defence Instructions (General) Personnel 42-6: Defence Community Organisation support for next of kin of deceased members of the ADF and ADF Cadets
   - Attachment 2: Defence Instructions (General) Personnel 11-2: Notification of service and non-Australian Defence Force casualties
   - Attachment 3: Defence Instructions (General) Personnel 20-5: Funerals, graves and associated matters
   - Attachment 4: ADF Pay and Conditions Manual Part 6 Chapter 9 – Payment of financial entitlements on death
   - Attachment 5: Health Bulletin No. 12/2003 – Critical incident mental health support program
2. Redress of Grievance statistics
   - Attachment 6: Table showing redress of grievance statistics by service as at 26 August 2004
3. Alternative dispute resolution awareness and training
4. Redress of Grievance process in relation to action of a service chief
   - Attachment 7: Defence Force Regulations 1952, Part XV, Redress of Grievances

5 August 2004 — Dept of Defence dated 2 December 2004 – Answers to 14 questions on notice relating to:

1. Travel assistance for next of kin
2. Legislative amendments re Director of Military Prosecutions and Chief Judge Advocate
3. Review of military police investigative capacity
   - Attachment 1: Review of military police battalion investigative capability – Report by Ernst and Young *June 2004*
4. Ms Melissa Munday's posting preferences with confidential attachments
5. Psychologist paper on the management of personnel returning from service on ships in the Middle East– confidential attachment
6. HMAS Westralia – post traumatic stress disorder statistics
7. Copy of McIvor report – not approved for release
8. Drug testing
9. Legal representation during BOI into disappearance of LS Gurr
10. Vetting of cadet staff
11. Investigations in ADF cadets
12. Investigating Officer training

- Attachment 2: Investigating Officer training – course timetable and lecture outline *September 2004*

13. Inspector General ADF – cases
14. ADF attitude survey
    - Attachment 3: Defence Attitude Survey 2003 – Military Justice supplement

6 August 2004 Dept of Defence dated 3 September 2004 (also sent on 1 November 2004) – Answer to 1 question on notice:

1. Request for copies of Defence instructions and manuals relating to the conduct of disciplinary investigations and hearings, the Discipline Law Manual and the McClelland review of the Defence Legal Service
    - Attachment 1: Defence Instructions (General) Personnel 12-1: General scope of legal assistance provided to service personnel and legal aid to Australian Defence Force members overseas
    - Attachment 2: Circular Memorandum No. 7/2002 *3 May 2002* - Application for indemnity and legal assistance at commonwealth expense including the Attorney General's legal services directions referenced in the Memorandum
    - Attachment 3: Independent Review of the Defence Legal Service – Final Report by Alan McClelland *April 2003.* (confidential)

10 August 2004 Dept of Defence dated 5 November 2004 - Answers to 4 questions on notice relating to:

1. Manuals used by military police for conduct of disciplinary investigations
    - Attachment 1: Defence Investigation Technical Instructions 2003 Chapter 1 (confidential)
    - Attachment 2: Navy Investigative Service Quality Manual April 2002 (confidential)
    - Attachment 3: List of all Defence policy documents relating to investigations conducted by military police (confidential)
    - Attachment 4: 5th Military Police Company Special Investigation Branch – Standing Orders March 2004 (confidential)
    - Attachment 5: Military Police Technical Instructions May 1985 (confidential)
    - Attachment 6: RAAF Police Manual (undated) Section 4
2. Redress of Grievance statistics
3. Public duty and private interest
    - Attachment 7: Defence Instructions (General) Personnel 25-3: Disclosure of interests of members of the ADF
    - Attachment 8: Defence Instructions (General) Personnel 25-4: Notification of post separation employment
4. Reason why Boards of Inquiry not appointed for several cases
    - Attachment 9: Administrative Inquiries Manual (undated) Annex E to Chapter 2 – Selecting the most appropriate type of inquiry

Clarification - 1 March and 2 August 2004

Dept of Defence dated 10 September 2004 – Clarification of statistics provided to Committee at hearing on 1 March 2004 (Hansard page 45) and

answers to question on notice taken at hearing on 2 August 2004 (Hansard pages 26 and 27) in relation to the number of Redresses of Grievance.

Clarification - 2 August 2004

Di Harris, Director, Complaint Resolution Agency dated 6 August 2004. Letter to Committee correcting errors in evidence given on 2 August 2004.

Clarification - 5 August 2004

Chief of Army dated 17 February 2005. Letter to Committee updating evidence given at hearing on 5 August 2004 re inquiry by Brigadier Dawson into the performance of several officers responsible for implementing the recommendations of the Amos Report.

Written question on notice from Committee Chair, Senator Hutchins

Dept of Defence dated 21 June 2004 – Answer to 1 written question on notice from Senator Hutchins:

1. What happened to remaining sailors on board HMAS Westralia?

Revised answer received from Dept of Defence dated 2 August 2004

Written question on notice from Chair, Senator Hutchins, 24 June 2004

Dept of Defence dated 10 December 2004. Answers to 6 written questions on notice relating to HMAS Westralia.

Appendix 3

Public hearings and witnesses

Monday, 1 March 2004 – Canberra

Cosgrove, General Peter John, Chief of the Defence Force
Earley, Mr Geoffrey John, Inspector General, Australian Defence Force, Department of Defence
Harvey, Air Commodore Simon John, Director-General, The Defence Legal Service, Department of Defence HEVEY, Colonel Gary, Director, Office of the Director of Military Prosecutions
Houston, Air Marshal Allan Grant, Chief of Air Force, Royal Australian Air Force
Leahy, Lieutenant General Peter, Chief of Army
Palmer, Mrs Madonna Therese (Private capacity)
Ritchie, Vice Admiral Chris, AO, RAN, Chief of Navy, Department of Defence

Wednesday, 21 April 2004 - Hobart

Campbell, Mrs Susan, (Private capacity)
Campbell, Ms Maria Bernadette, (Private capacity)
Gurr, Ms Joan Rosemary, (Private capacity)
Munday, Miss Melissa Ann, (Private capacity)

Thursday, 22 April 2004 – Brisbane

Behm, Group Captain Anthony Patrick, (Private capacity)
Campbell, Mrs Michelle Lee, (Private capacity)
Ford, Mr Jonathan Robert, (Private capacity)
Giffen, Ms Coral Anne, (Private capacity)
Goodman, Mrs Cheryl Lenore, (Private capacity)
Liddell, Mrs Dulcie Kathleen, (Private capacity)
Pelly, Mr Bernard Andrew, (Private capacity)
Pelly, Mr Lyndon Ross, (Private capacity)
Pelly, Mrs Christine Anne, (Private capacity)
Sturgess, Mrs Yvonne May, (Private capacity)

Wednesday, 28 April 2004 – Melbourne

Bodas, Mr Charles, (Private capacity)
McNess, Mr Norman John, (Private capacity)
McNess, Mrs Janice Margaret, (Private capacity)
Satatas, Mr George, (Private capacity)
Satatas, Mr Richard, (Private capacity)
Satatas, Mrs Rosa, (Private capacity)

Showler, Mr Keith Douglas, (Private capacity)
Williams, Mr Charles Edwards, (Private capacity)
Williams, Mrs Jan Mary, (Private capacity)
Williams, Ms Ruth Anne, (Private capacity)

Thursday, 29 April 2004 – Adelaide

Gee, Mr Kenneth James, (Private capacity)
Gee, Mrs Myra, (Private capacity)
Hyland, Chief Petty Officer John, (Private capacity)
Knight, Mr Leslie, (Private capacity)
Knight, Mrs Debra Joan, (Private capacity)
Shiels, Lieutenant Commander Paul St John (Rtd), (Private capacity)
Shiels, Mrs Antoinette Louise, (Private capacity)

Wednesdsay, 9 June 20004 – Canberra

Brent, Mr Ron, Deputy Ombudsman, Commonwealth Ombudsman
Clark, Mr James Grant, (Private capacity)
Collaery, Mr Bernard Joseph Edward, (Private capacity)
James, Mr Neil Frederick, Executive Director, Australia Defence Association
McMillan, Prof. John Denison, Commonwealth Ombudsman, Commonwealth Ombudsman
Nash, Dr Diane, Director, Defence Team, Commonwealth Ombudsman
Richards, Mr David Ian, (Private capacity)
Southam, Mr Nigel, (Private capacity)

Monday, 21 June 2004 – Canberra

Cotton, Colonel Anthony James, Director of Mental Health, Department of Defence
Eacott, Brigadier Leonard Sidney, Principal Chaplain, Army, Department of Defence
McDermott, Air Commodore Peter John, Director-General of Reserves, Royal Australian Air Force, Department of Defence
Roberts-Smith, Justice Leonard William, Major General, Judge Advocate General, Australian Defence Force

Monday, 2 August 2004 – Canberra

Adams, Rear Admiral Brian Lee, Head, Defence Personnel Executive, Department of Defence
Harris, Ms Diane Julie, Director, Complaint Resolution Agency, Department of Defence
Hevey, Colonel Gary, Director, Office of the Director of Military Prosecutions
Marks, Captain Helen Elizabeth, Director, Alternative Dispute Resolution and Conflict Management, Department of Defence
Stodulka, Ms Janet Louisa, Director-General, Defence Community Organisation

Thursday, 5 August 2004 – Canberra

Earley, Mr Geoffrey John, Inspector-General Australian Defence Force, Department of Defence
Harvey, Air Commodore Simon John, Director-General, Australian Defence Force Legal Service
Houston, Air Marshal Angus, Chief of Air Force
Leahy, Lieutenant General Peter Francis, Chief of Army
McConachie, Captain Vicki Maree, Chief of Staff, Inspector-General Australian Defence Force, Department of Defence
Ritchie, Vice Admiral Christopher Angus, Chief of Navy

Friday, 6 August 2004 – Canberra

Cosgrove, General Peter, AC, MC, Chief of the Defence Force
Harvey, Air Commodore Simon John, Director-General, Australian Defence Force Legal Service, Department of Defence
Westwood, Colonel Ian Denis, Chief Judge Advocate, Office of Judge Advocate General, Department of Defence

Tuesday, 10 August 2004 – Canberra

Harvey, Air Commodore Simon John, Director-General, Australian Defence Force Legal Service, Department of Defence
Westwood, Colonel Ian Denis, Chief Judge Advocate, Office of the Judge Advocate General, Department of Defence